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Minority Action versus Union Exclusivity: The Need to Harmonize NLRA and Title VII Policies

By CHARLES B. CRAVER*

[T]he [Labor] Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.¹

Congress has vested expert administrative bodies . . . with broad discretion and has charged them with the duty to execute stated and specific statutory policies. That delegation does not necessarily include either the duty or the authority to execute numerous other laws.²

DURING the 1974-1975 session, the United States Supreme Court will decide whether and to what extent the National Labor Relations Board ("Labor Board" or "NLRB") should consider the policies em-

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1. *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942).

2. *McLean Trucking Co. v. United States*, 321 U.S. 67, 79 (1944). The *McLean Trucking* Court, which was specifically concerned with the proper authority of the ICC, did, however, recognize that a federal administrative agency cannot always operate in a statutory vacuum: "The Commission's task is to enforce the Interstate Commerce Act and other legislation which deals specifically with transportation facilities and problems. That legislation constitutes the immediate frame of reference within which the Commission operates; and the policies expressed in it must be the basic determinants of its action."

"But in executing those policies the Commission may be faced with overlapping and at times inconsistent policies embodied in other legislation enacted at different times and with different problems in view. When this is true, it cannot, without more, ignore the latter. The precise adjustments which it must make, however, will vary from

bodied in Title VII of the Civil Rights Act of 1964³ when it interprets and applies the provisions contained in the National Labor Relations Act ("NLRA").⁴ The particular case,⁵ which arose in San Francisco, concerns the propriety, under the NLRA, of independent concerted activity undertaken by black employees to protest the allegedly discriminatory practices of their employer, where they have concluded that their collective bargaining representative has not acted to alleviate the purported problem as effectively and expediently as it could. The Court's decision could have far-reaching ramifications for minority workers who are not satisfied with the efforts of their union to eliminate employment discrimination.⁶

This article will provide a critical evaluation of the result achieved by the D. C. Circuit in its *Emporium* opinion and will endeavor to suggest a workable approach which comports with the policies of both the NLRA and Title VII, while doing violence to the principles of neither act. Before turning to the general policies underlying the NLRA and Title VII and the specific NLRA doctrines relevant to independent concerted activity by minority employees, the facts of the *Emporium* case should be delineated.

instance to instance depending on the extent to which Congress indicates a desire to have those policies leavened or implemented in the enforcement of the various specific provisions of the legislation with which the Commission is primarily and directly concerned." *Id.* at 79-80.

3. 42 U.S.C. §§ 2000e-1 to 2000e-17 (1970), *as amended*, 86 Stat. 103 (1972).

4. 29 U.S.C. §§ 151-68 (1970).

5. The *Emporium*, 192 N.L.R.B. 173 (1971), *rev'd sub nom.* *Western Addition Community Org. v. NLRB*, 485 F.2d 917 (D.C. Cir. 1973), *cert. granted*, 42 U.S.L.W. 3457 (U.S. Feb. 19, 1974).

6. The Court's resolution of the *Emporium* question could also significantly affect many labor organizations and employers, due to "the new militancy of Negro employees who are frustrated by what they regard as discriminatory or poor working conditions and by the failure of the almost lily-white union leadership to correct those conditions." Gould, *Racial Equality in Jobs and Unions, Collective Bargaining, and the Burger Court*, 68 MICH. L. REV. 237, 238 (1969) [hereinafter cited as *Racial Equality*]; see also Gould, *Black Power in the Unions: The Impact Upon Collective Bargaining Relationships*, 79 YALE L.J. 46, 46-48 (1969); [hereinafter cited as *Black Power*]; Hill, *Black Protest and the Struggle for Union Democracy*, 1 ISSUES IN INDUSTRIAL SOCIETY 19 (1969); Henle, *Some Reflections on Organized Labor and the New Militants*, 92 MONTHLY LAB. REV. 20 (1969). "Even unions which integrate smoothly and readily can expect internal racial tensions, not only because of lingering white prejudice but because of black militancy as well." Hain, *Black Workers Versus White Unions: Alternate Strategies in the Construction Industry*, 16 WAYNE L. REV. 37, 73 (1969). Therefore, should militant minority dissidents be provided with the protected freedom to engage in disruptive behavior to protest alleged discrimination, the adverse effect upon stable union-management relationships could be substantial.

The Emporium Decision

Facts

The facts in the *Emporium* case are relatively uncontroverted.⁷ The Emporium Company ("Company") operated a retail department store, and the Department Store Employees Union ("Union") was the exclusive collective bargaining representative of the Company's stock and marketing employees. The applicable collective bargaining agreement contained a broad no-discrimination clause,⁸ and it provided a grievance-arbitration mechanism for the resolution of disputes concerning the interpretation and application of the contract.⁹ It also contained a no-strike provision.¹⁰

In early April of 1968,¹¹ Company employees, including Tom Hawkins and James Hollins, held a series of meetings with Union representatives during which they submitted a list of grievances concerning alleged racial discrimination by the Company. They claimed that promotions had been denied employees because of race, and they specifically noted the case of employee Russel Young. Following these meetings, Union Secretary-Treasurer Walter Johnson designated a special committee to investigate the charges, and in mid-April, the committee issued a report which concluded that the Company was discriminating against black employees and the more senior workers.¹²

7. For detailed descriptions of facts, see 192 N.L.R.B. at 179-83, and 485 F.2d at 919-24. See also Note, 72 MICH. L. REV. 313, 316-20 (1973).

8. Section 21(E) of the agreement provided "[n]o person shall be discriminated against in regard to hire, tenure of employment or job status by reason of race, color, creed, national origin, age or sex." 485 F.2d at 920 n.3; 192 N.L.R.B. at 180 n.3.

9. Section 5(B) of the contract, which covered a multi-employer group of which the Company was a member, provided in relevant part: "Any act of any employer, representative of the Union, or any employee that is interfering with the faithful performance of this agreement . . . may be referred to the Adjustment Board for such action as the Adjustment Board deems proper, and is permissive within this agreement." *Id.* n.4; 192 N.L.R.B. at 180 n.4. The agreement further provided that if the adjustment board, which consisted of Union and employer representatives, was unable to resolve a particular dispute within one week, either party could insist upon final and binding arbitration. *Id.* n.5; 192 N.L.R.B. at 180 n.5.

10. Section 36(A) of the Agreement provided: "There shall be no strike or lock-out during the life of this agreement." 192 N.L.R.B. at 180.

11. All dates mentioned herein pertain to 1968, unless otherwise noted.

12. The committee's report stated, *inter alia*: "Probably the most important matter raised was the possibility of racial discrimination. This is outlawed under the terms of the agreement and certainly again in this day and age should not be a problem. It was the general feeling of almost all present that discrimination is directed against the Negro employees and the more senior employees, senior, that is, in the point of age." 485 F.2d at 920 n.6; 192 N.L.R.B. at 180 n.6.

The Union decided that these grievances should be pursued, and shortly thereafter, Johnson met with the Company labor relations manager who agreed to explore the situation.

In May, a group of ten employees again met with Johnson to discuss racial discrimination in general and the case of Russel Young in particular. However, since Young was about to commence his vacation, it was agreed to postpone further investigatory action until his return. In early September, Johnson again met with the employees, including Hawkins and Hollins, and, in the presence of representatives from the Fair Employment Practices Committee ("FEPC") and the Equal Employment Opportunity Commission ("EEOC"), he announced that the Union had concluded that discriminatory practices had been occurring. Johnson further indicated that the Union was going to demand an adjustment board proceeding and was prepared to take the matter to arbitration if necessary. Although Johnson noted that the process would be time-consuming, he emphasized that an award, once achieved, would produce a "long lasting effect" which would be of benefit to other minority employees.¹³

The dispute resolution procedure enunciated by the Union did not placate all of the employees. Some expressed frustration with the situation and requested that the Union picket the Emporium store. Johnson rejected this proposal, explaining that the Union was bound to resolve contractual grievances through the procedure defined in the bargaining agreement. However, while he further advised the dissatisfied employees to follow the adjustment board and arbitration procedure, he did indicate that "individuals could take whatever action they wanted to as long as it was legal."¹⁴ The EEOC and FEPC representatives also recommended that the contractual grievance-arbitration process be utilized. The next day, Johnson filed a broad discrimination grievance indicating the willingness of the Union to proceed to arbitration immediately.¹⁵

13. Johnson indicated that the Union was prepared to process grievances pertaining to all of the alleged discriminatory actions. *Id.* at 921 n.8; 192 N.L.R.B. at 180 n.8.

14. 192 N.L.R.B. at 182. *See also* 485 F.2d at 921.

15. Johnson's grievance letter, which requested a meeting of the Adjustment Board to resolve the discrimination grievances, stated, "We specifically charge the Emporium with violations of [the antidiscrimination clause] of the Agreement between the San Francisco Retailers' Council and [the Union]. We have approximately 120 pages of testimony, recorded by a court reporter to substantiate our position.

"We are ready to proceed to immediate arbitration if the Emporium is agreeable." 485 F.2d at 921; 192 N.L.R.B. at 180-81.

On October 16, an adjustment board meeting was convened. Union Agent Williams endeavored at the outset to present evidence of the Company's practices by questioning employees regarding their individual grievances. However, he was interrupted by Hollins, who, speaking for himself, Hawkins and two other workers, read a prepared statement objecting to the prosecution of grievances on an individual basis. The statement indicated that these four workers would only act as a group. It further stated that they "wanted to talk to the President of the Emporium and wouldn't talk to anybody else," since their "main purpose was to talk to the President to try to reach an agreement with him to straighten out the problems and conditions of the Emporium."¹⁶ Thereafter, following their refusal to provide any testimony regarding the individual grievances involved, the four people left the meeting. Furthermore, none of the four attended a second adjustment board meeting which was held two days later.¹⁷

A short time later, Hollins went to see the Company president, requesting that they "talk about a situation that [Hollins] felt should be discussed about things that were happening among minority employees at the store."¹⁸ The president refused to meet with Hollins and suggested that he instead discuss the matter with the Company personnel director. However, Hollins declined to follow this suggestion, having previously spoken with the personnel director about the situation.

On October 22, Hawkins, Hollins and several other employees conducted a press conference which was attended by representatives of the press, radio and television. They stated that the Company was engaging in racist conduct by discriminating against minority employees, and they indicated their intention to picket the store. Hollins also read a leaflet which he said they planned to distribute to the public, calling for a consumer boycott.

On Saturday, November 2, Hollins, Hawkins, and two other employees picketed the Emporium from 9:30 a.m. to 6:00 p.m. The picketing occurred on the employees' own time. There was neither violence nor incitement to violence, and the entrances to the store were not obstructed. During their picketing, the four workers des-

16. 485 F.2d at 922. See also 192 N.L.R.B. at 181 n.2.

17. Although the record does not clearly indicate what transpired at the second adjustment board meeting, it is clear that two minority workers, including Young, were promoted by the Company in the Fall of 1968 before Hollins and Hawkins engaged in any picketing activity. 485 F.2d at 922 n.14; 192 N.L.R.B. at 181 n.14.

18. 485 F.2d at 922; 192 N.L.R.B. at 181.

seminated pamphlets to passersby.¹⁹

After the picketing by the four dissident employees commenced, a union business agent told Hawkins that the picketers were utilizing an incorrect approach, and he indicated that they should allow the Union to handle the matter. At about the same time, Johnson informed Hollins that he did not wish to see him fired, and he indicated that the only manner in which to resolve the discrimination difficulty was through arbitration. Hollins reiterated their desire to meet with the Company president.

On November 7, Hollins and Hawkins were summoned to the office of the Company labor relations manager, where they were presented with written warnings to refrain from further picketing or face the possibility of discharge.²⁰ Despite these express warnings, Hawkins and Hollins again picketed the store and distributed leaflets the fol-

19.

**BEWARE EMPORIUM SHOPPERS
BOYCOTT IS ON!!!**

FOR YEARS AT THE EMPORIUM BLACK, BROWN, YELLOW AND RED PEOPLE, HAVE WORKED AT THE LOWEST LEVELS. TIME AND TIME AGAIN WE HAVE SEEN INTELLIGENT HARD WORKING BROTHERS AND SISTERS DENIED PROMOTIONS AND BASIC RESPECT.

THE EMPORIUM IS A 20TH CENTURY COLONIAL PLANTATION. THE BROTHERS AND SISTERS ARE BEING TREATED THE SAME WAY AS OUR BROTHERS ARE BEING TREATED IN THE SLAVE MINES OF SOUTH AFRICA.

WHENEVER THE RACIST PIG AT THE EMPORIUM INJURES OR HARMS A BLACK SISTER OR BROTHER, THEY INJURE AND INSULT ALL BLACK PEOPLE. THE EMPORIUM MUST PAY FOR THESE INSULTS. THEREFORE, WE ENCOURAGE ALL OF OUR PEOPLE TO TAKE THEIR MONEY OUT OF THIS RACIST STORE, UNTIL BLACK PEOPLE HAVE FULL EMPLOYMENT AND ARE PROMOTED JUSTLY THROUGH-OUT THE EMPORIUM.

WE WELCOME THE SUPPORT OF OUR BROTHERS AND SISTERS FROM THE CHURCHES, UNIONS, SORORITIES, FRATERNITIES, SOCIAL CLUBS, AFRO-AMERICAN INSTITUTE, BLACK PANTHER PARTY, W.A.C.O. AND THE POOR PEOPLE'S INSTITUTE. 485 F.2d at 922; 192 N.L.R.B. at 181.

20. The warning statement to Hollins was as follows: "On October 22, 1968, you issued a public statement at a press conference to which all newspapers, radio, and TV stations were invited. The contents of this statement were substantially the same as these set forth in the sheet attached. This statement was broadcast on Channel 2 on October 22, 1968 and station KDIA.

"On November 2nd you distributed copies of the attached statement to Negro customers and prospective customers, and to other persons passing by in front of The Emporium.

"These statements are untrue and are intended to and will, if continued injure the reputation of The Emporium.

"There are ample legal remedies to correct any discrimination you may claim to exist. Therefore, we view your activities as a deliberate and unjustified attempt to injure your employer.

"This is to inform you that you may be discharged if you repeat any of the above acts or make any similar public statement." 485 F.2d at 923 n.17; 192 N.L.R.B. at 181-82. The message provided to Hawkins was essentially identical.

lowing Saturday. Accordingly, on Monday, November 11, Hawkins and Hollins were both terminated.²¹ Thereafter, the Union filed a protest concerning their discharge, but it did not initiate the unfair labor practice proceeding.

Proceedings Before NLRB and D. C. Circuit

On November 19, 1968, the Western Addition Community Organization filed a charge with the Labor Board alleging that the Company had violated section 8(a)(1) of the NLRA²² by terminating Hawkins and Hollins. An unfair labor practice complaint was issued pursuant to this charge, and a hearing was held before Trial Examiner²³ William Spencer. The trial examiner concluded that Hawkins and Hollins had engaged in concerted activity which had been induced by a good faith belief that the Company had been discriminating against racial minorities.²⁴ He next considered the question of whether the picketing activities lost the protection of the NLRA by virtue of the boycott appeal and strong invective directed against the Company. Though he criticized the language contained in the leaflets and found "the potential for injury [to the Company] considerable,"²⁵ he did not reach a definitive resolution of the issue. He instead determined that the actions taken were so inconsistent with and disruptive

21. Their written discharge notices stated, "You are being discharged today. Distribution of 'Boycott Emporium' literature on Saturday, November 9, 1968, in front of the Emporium, 855 Market Street, S.F., pursuant to written warning dated 11/7/68 for similar action on 11/2/68." *Id.* n.18; 192 N.L.R.B. at 182.

22. 29 U.S.C. § 158(a)(1) (1970), which provides, "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title. . . ." Section 7 of NLRA, 29 U.S.C. § 157 (1970), provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title." Section 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3) (1970), authorizes a labor organization and an employer to enter into a union security agreement requiring employees to pay union dues and initiation fees as a condition of continued employment. *See* Union Starch & Refining Co., 87 N.L.R.B. 779 (1949), *enforced*, 186 F.2d 1008 (7th Cir.), *cert. denied*, 342 U.S. 815 (1951); *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963). *See also* Toner, *The Union Shop Under Taft-Hartley*, 5 LAB. L.J. 552 (1954). *See generally* Note, 52 MICH. L. REV. 619 (1954).

23. Trial examiners are now denoted administrative law judges.

24. The trial examiner's decision is reported in 192 N.L.R.B. at 179.

25. 192 N.L.R.B. at 185. *See* notes 224 & 271 *infra*, for further consideration of the propriety of the boycott appeal and strong language utilized by the picketers.

of the procedures for resolving grievances under the collective bargaining agreement that it would not effectuate the policies of the NLRA to extend its protection to such activities.²⁶

The trial examiner's critical determination was based upon three primary factors: (1) the fact that he found "no basis in the evidence for a finding that the Union approved, endorsed, or in any way connived in the action taken by the four employees;"²⁷ (2) the fact "that this was no mere presentation of a grievance but nothing short of a demand that the [Company] bargain with the picketing employees for the entire group of minority employees;"²⁸ and (3) the fact that "the Union, [the picketers'] duly designated bargaining representative, was endeavoring in every way available to it under the agreement to adjust any and all cases of racial discrimination brought to its attention."²⁹ From these findings, he succinctly concluded:

[T]o extend the protection of the Act to the two employees named in the complaint would seriously undermine the right of the employees to bargain collectively through representatives of their own choosing, handicap and prejudice the employees' duly designated representative in its efforts to bring about a durable improvement in working conditions among employees belonging to racial minorities, and place on the Employer an unreasonable burden of attempting to placate self-designated representatives of minority groups while abiding by the terms of a valid bargaining agreement and attempting in good faith to meet whatever demands the bargaining representative put forth under the agreement.³⁰

The trial examiner's decision was appealed to the NLRB which provided the parties with the rarely granted opportunity for oral argument. Despite this unusual procedure, the three-member majority affirmed the trial examiner's decision in a brief statement which wholly adopted the findings and conclusions of the examiner.³¹ Thereafter

26. 192 N.L.R.B. at 186.

27. *Id.* at 185.

28. *Id.*

29. *Id.*

30. *Id.* at 186.

31. The Emporium, 192 N.L.R.B. 173 (1971). As is true of very many of the cases decided by the Labor Board, no separate reasons for their holding were provided by the majority.

Members Brown and Jenkins dissented. Member Brown did not believe that the picketers' mere attempt to discuss their grievances with the Company constituted any derogation from the negotiating authority of the designated Union representative. 192 N.L.R.B. at 177-99. Member Jenkins, on the other hand, while conceding that "the Union may have been exercising the full range of its power and ability to eliminate racial discrimination," nonetheless employed reasoning quite similar to that subsequently utilized by the D. C. Circuit in reversing the majority decision, as he concluded

the D. C. Circuit reversed the Labor Board's holding.³²

The two-judge majority opinion of the D. C. Circuit, relying substantially upon the doctrine enunciated in the *Southern Steamship* decision,³³ emphasized the need for the Labor Board to consider the strong policy implications of Title VII when interpreting and applying the provisions of the NLRA in cases involving racial discrimination.³⁴ The majority emphasized that concerted minority activity aimed at the elimination of racial discrimination cannot detract from or conflict with the position of the representative labor organization, since Title VII imposes upon all unions the obligation to endeavor to eradicate expeditiously any such discrimination.³⁵ The decision indicated that dissatisfied minority employees should attempt to utilize the contractual grievance-arbitration machinery before resorting to self-help measures, and it recognized that the record contained no evidence of bad faith on the part of the Union.³⁶ It even acknowledged that the Union may well have proceeded in the manner which it reasonably believed would produce the optimal and most lasting results.³⁷ Nevertheless, the court concluded that the Union's actions may not have been sufficient, in light of Title VII considerations, to warrant the withdrawal of NLRA protection from the activities engaged in by the dissident picketers, and it ordered the case remanded to the NLRB so that it could apply the majority's newly enunciated standard.³⁸

[T]he Labor Board should inquire, in cases such as this, whether the union was actually remedying the discrimination to the *fullest extent possible, by the most expedient and efficacious means*. Where the union's efforts fall short of this high standard, the minority group's concerted activities cannot lose its [sic] section 7 protection.³⁹

that where minority employees are protesting race discrimination, they are to be provided with extremely wide latitude before the protection of the NLRA will be forfeited. *Id.* at 173-77.

32. *Western Addition Community Org. v. NLRB*, 485 F.2d 917 (D.C. Cir. 1973), *cert. granted*, 42 U.S.L.W. 3457 (U.S. Feb 19, 1974).

33. See note 1 & accompanying text *supra*.

34. 485 F.2d at 927-28.

35. *Id.* at 928-30. The court noted that "[t]he law does not give the union an option to tolerate *some* racial discrimination, but declares that *all* racial discrimination in employment is illegal." *Id.* at 928 (emphasis in original).

36. *Id.* at 929-30. Thus the D. C. Circuit concurred with the trial examiner's finding regarding the good faith/bad faith issue. 192 N.L.R.B. at 185.

37. 485 F.2d at 930.

38. *Id.* at 931.

39. *Id.* (emphasis in original). The court also indicated that on remand the Labor Board could determine whether the dissidents' action evidenced such disloyalty to the Company as to warrant a denial of NLRA protection. *Id.* See note 271 *infra*, regarding this issue.

Judge Wyzanski issued a strong dissent which is noteworthy for its ideological appeal. He indicated that the majority opinion had not provided sufficient protection for minority protesters who were dissatisfied with their labor representative's efforts to alleviate the problems of discrimination.⁴⁰ In an opinion which perhaps injudiciously assumed that labor unions composed of white majorities could not fairly represent the interests of racial minorities,⁴¹ Judge Wyzanski noted that "it is essentially a denial of justice to allow the white majority to have the power to preclude the non-whites from dealing directly with the employer on racial issues, whether or not this is in disparagement of the rights of the union representative."⁴²

TO LEAVE NON-WHITES AT THE MERCY OF WHITES IN THE PRESENTATION OF NON-WHITE CLAIMS WHICH ARE ADMITTEDLY ADVERSE TO THE WHITES WOULD BE A MOCKERY OF DEMOCRACY. SUPPRESSION, INTENTIONAL OR OTHERWISE, OF THE PRESENTATION OF NON-WHITE CLAIMS CANNOT BE TOLERATED IN OUR SOCIETY EVEN IF, WHICH IS PROBABLY AT LEAST THE SHORT-TERM CONSEQUENCE, THE RESULT IS THAT INDUSTRIAL PEACE IS TEMPORARILY ADVERSELY AFFECTED. IN PRESENTING NON-WHITE ISSUES NON-WHITES CANNOT, AGAINST THEIR WILL, BE RELEGATED TO WHITE SPOKESMEN, MIMICKING BLACK MEN. THE DAY OF THE MINSTREL SHOW IS OVER.⁴³

General Underlying Policies

National Labor Relations Act

Prior to the enactment of the National Labor Relations Act in 1935,⁴⁴ there was a significant amount of labor unrest in America, since most union organizing efforts lacked the protection of federal law.⁴⁵ However, with the passage of the NLRA, workers were pro-

40. 485 F.2d at 932-41.

41. *Id.* at 937-39.

42. *Id.* at 938-39. Judge Wyzanski clearly believed that constitutional problems would be encountered if the NLRA were to be interpreted in a manner which could possibly permit white majority unions in any fashion to thwart the efforts of racial minorities to achieve employment justice. *Id.* See text accompanying notes 264-71 *infra*.

43. 485 F.2d at 940.

44. 29 U.S.C. §§ 151-68 (1970), formerly 49 Stat. 449 (1935).

45. See generally P. TAFT, ORGANIZED LABOR IN AMERICAN HISTORY (1964); F. DULLES, LABOR IN AMERICA (3d ed. 1966); A. GITLOW, LABOR AND INDUSTRIAL SOCIETY (rev. ed. 1963); S. PERLMAN, HISTORY OF TRADE UNIONISM IN THE UNITED STATES (1922); S. PERLMAN & P. TAFT, HISTORY OF LABOR IN THE UNITED STATES, 1896-1932 (1935).

Although the labor protections of the National Industrial Recovery Act, 48 Stat.

vided with a legal vehicle for insuring the protection of their newly-created right to organize for mutual benefit.⁴⁶ The NLRA declared it to be

"the policy of the United States" to encourage the practice of collective bargaining and full freedom of worker self-organization, as a means of facilitating the free flow of interstate commerce. Employees covered by the act were given the "right" to organize and to bargain collectively and this right was made effective by proscribing as "unfair labor practices," five kinds of employer conduct vis-a-vis unionism. The principle of "majority rule" among employees in selecting union representatives was adopted, and a . . . National Labor Relations Board was created with authority to settle representation questions and to prosecute violations of the unfair labor practice provisions of the act.⁴⁷

In 1947, the Taft-Hartley Act⁴⁸ amended the NLRA by proscribing certain unfair labor practices by labor organizations,⁴⁹ and in 1959, the Landrum-Griffin Act⁵⁰ provided a few additional refinements.

The NLRA's pervasive code of labor regulations severely limited the right of unions, employees,⁵¹ and employers to engage in activities which would be disruptive of commerce. Although resort to traditional economic action was clearly not prohibited,⁵² particularly during

198 (1933), had preceded the Wagner Act by two years, they were of short-lived duration, being declared unconstitutional in *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

46. In *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the constitutionality of the NLRA was sustained.

47. R. SMITH, L. MERRIFIELD & T. ST. ANTOINE, *LABOR RELATIONS LAW* 37 (4th ed. 1968). See also *Washington, Va. & Md. Coach Co. v. NLRB*, 301 U.S. 142 (1937); *Associated Press v. NLRB*, 301 U.S. 103 (1937); *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

The Labor Board was created to provide an administrative agency which would develop broad expertise in the labor area. See Christensen, *The Functioning of the National Labor Relations Board: A Critique*, in N.Y.U. 16TH ANNUAL CONFERENCE ON LABOR 177, 178 (1963); Note, *Racially Discriminatory Union Conduct: Constitutional Commands for the NLRB*, 56 IOWA L. REV. 1044, 1054 (1971). But see Getman & Goldberg, *The Myth of Board Expertise*, 39 U. CHI. L. REV. 681 (1972).

48. Labor-Management Relations Act, 29 U.S.C. §§ 141-87 (1970).

49. NLRA § 8(b), 29 U.S.C. § 158(b) (1970) (union unfair labor practices).

50. Labor-Management Reporting & Disclosure Act of 1959, 29 U.S.C. §§ 153, 158-60, 164, 186-87, 401-531 (1970).

51. Although the NLRA only proscribes unfair labor practices by "employers" and "labor organizations," it is well established that individual employees may forfeit the protection of that Act when they engage in activities detrimental to an existing bargaining relationship or in derogation of their designated representative union. See notes 153-66 *infra*, regarding the parameters and ramifications of the exclusivity doctrine as it affects individual workers.

52. NLRA § 13, 29 U.S.C. § 163 (1970), expressly provides that, "Nothing in

the collective bargaining process,⁵³ Congress expressly indicated its desire to have disputes which arose during the term of a negotiated contract resolved by peaceful, noncoercive means.

Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.⁵⁴

To insure further the stability of employer-employee relations, section 9(a) of the NLRA⁵⁵ expressly provided that the union designated by the majority of employees in an appropriate bargaining unit shall be the "exclusive" representative of *all* of the workers in that unit with respect to wages, hours, and other terms and conditions of employment. This was to prevent the types of intolerable work interruption which could be precipitated by the unauthorized actions of dissident minorities.⁵⁶ It is this "exclusivity" principle which the Supreme Court may have to harmonize with the policies embodied in Title VII when it decides the *Emporium* case.

Title VII of the Civil Rights Act of 1964

Prior to and during the period when Congress was establishing a pervasive legislative scheme for the protection and regulation of the collective bargaining rights of employees, discrimination in employment was being openly practiced.⁵⁷ In fact, it was not until the enact-

this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." *See also* NLRB v. Insurance Agents Int'l Union, 361 U.S. 477 (1960).

53. *See, e.g.*, NLRB v. Insurance Agents Int'l Union, 361 U.S. 477, 489 (1960), wherein the Supreme Court recognized that the utilization of economic weapons by negotiating parties is "part and parcel" of the collective bargaining process. *See also* NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 181 (1967).

54. Labor-Management Relations Act (Taft-Hartley Act) § 203(d), 29 U.S.C. § 173(d) (1970).

55. 29 U.S.C. § 159(a) (1970). The text of which is contained in note 152 *infra*.

56. *See* text accompanying notes 167-201 *infra*, for a detailed explication of the exclusivity doctrine and its effect upon minority groups.

57. *Racial Equality*, *supra* note 6, at 239. For a discussion of the pervasive practices and effects of racial discrimination prior to the enactment of Title VII in 1964, *see* F. MARSHALL, *THE NEGRO AND ORGANIZED LABOR* (1965); P. NORGREN & S. HILL, *TOWARD FAIR EMPLOYMENT* (1964); M. SOVERN, *LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT* (1966); Kaplan, *Equal Justice in an Unequal World—The Problem of Special Treatment*, 61 NW. U.L. REV. 455 (1971).

ment of Title VII in 1964 that Congress meaningfully addressed the problem.

By 1964, Congress began to recognize the pernicious effect which employment discrimination has upon American society.⁵⁸ It realized "that in a substantial number of instances black workers were not being dealt with fairly in the collective bargaining process."⁵⁹ The inclusion of no-discrimination clauses in negotiated agreements were of little significance, since both white union leaders and company officials frequently were insensitive to undesirable working conditions affecting black employees and usually did not implement the provisions.⁶⁰ The answer of Congress to the unconscionable plight of minority workers was the enactment of Title VII which boldly embodied a strong federal policy against employment discrimination.

Title VII has provided workers with comprehensive protection against discrimination practiced by either employers or labor organizations based upon race, color, religion, sex, or national origin.⁶¹ Nevertheless, it has not granted any exalted status to these "minorities."

58. "Racial discrimination poses a problem so difficult and aggravating as to constitute a major threat to the preservation of American society and its formally stated ideals. . . . Elimination of planned and unplanned discrimination in employment is a crucial step in breaking down the intricate pattern which perpetuates currently practiced discrimination. Without adequate employment opportunities the victims of racial discrimination are unable to afford adequate housing, education or training, and the minority group fails to produce its proportion of the whole society's success models." Peck, *Remedies for Racial Discrimination in Employment: A Comparative Evaluation of Forums*, 46 WASH. L. REV. 455 (1971) [hereinafter cited as *Racial Discrimination in Employment*].

59. *Racial Equality*, *supra* note 6, at 239.

60. *Black Power*, *supra* note 6, at 48; see Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, 118 U. PA. L. REV. 40, 63 (1969) [hereinafter cited as *Labor Arbitration*].

61. 42 U.S.C. §§ 1971, 2000e-1 to -17 (Supp. II 1972). For analyses of the substantive and procedural aspects of Title VII of the Civil Rights Acts of 1964 see M. SOVERN, *LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT* (1966); Blumrosen, *The Duty of Fair Recruitment Under the Civil Rights Act of 1964*, 22 RUTGERS L. REV. 465 (1968); Cooksey, *The Role of Law in Equal Employment Opportunity*, 7 B.C. IND. & COM. L. REV. 417 (1966); Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598 (1969); Gould, *Employment Security, Seniority and Race: The Role of Title VII of the Civil Rights Act of 1964*, 13 HOW. L.J. 1 (1967); *Racial Discrimination in Employment*, *supra* note 58; Rachlin, *Title VII: Limitations and Qualifications*, 7 B.C. IND. & COM. L. REV. 473 (1966); Rosen, *The Law and Racial Discrimination in Employment*, 53 CALIF. L. REV. 729 (1965) [hereinafter cited as Rosen]; Schmidt, *Title VII: Coverage and Comments*, 7 B.C. IND. & COM. L. REV. 459 (1966); Sherman, *Union's Duty of Fair Representation and the Civil Rights Act of 1964*, 32 MINN. L. REV. 771 (1965) [hereinafter cited as Sherman]; Note, *Title VII, Seniority, Discrimination and the Incumbent Negro*, 80 HARV.

The objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees

Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.⁶²

The Title VII policy against preferential treatment for any group will certainly warrant consideration by the Supreme Court when it evaluates the principles relevant to the *Emporium* case. The Court will also have to consider the appropriate weight which should be accorded to section 704(a) of Title VII,⁶³ which prohibits discriminatory action by an employer or a union based upon the fact that an individual "has opposed any practice made an unlawful employment practice by this title." However, prior to our exploration of these important questions, it would be beneficial to examine two highly pertinent areas of concern under the NLRA. First, the manner in which the Labor Board has historically handled racial discrimination cases, and second, the evolution and application of the "exclusivity" doctrine which protects the authority and status of the majority bargaining representative.

L. REV. 1260 (1967); Note, *The Civil Rights Act of 1964, Racial Discrimination by Labor Unions*, 41 ST. JOHN'S L. REV. 58 (1966); Comment, *The Scope of Judicial Relief Under Title VII of the Civil Rights Act of 1964*, 46 TEXAS L. REV. 516 (1968); Comment, *Enforcement of Fair Employment Under the Civil Rights Act of 1964*, 32 U. CHI. L. REV. 430 (1965); Note, *Implementing Governmental Policy Against Racial Discrimination in Employment: Fair Employment Practice Laws, Title VII, National Labor Relations Act, and the Philadelphia Act*, 23 U. FLA. L. REV. 157, 162-80 (1970); Note, *Civil Rights Act of 1964: Discrimination and Union Membership*, 27 WASH. & LEE L. REV. 323 (1970). For analyses of the 1972 amendments to Title VII see Comment, *Policy Conflict: Should an Arbitration Award Be Allowed to Bar a Suit Under Title VII of the Civil Rights Act of 1964?*, 20 U.C.L.A.L. REV. 84, 116-17 & nn. 155-57 (1972). For related anti-discrimination legislation see Equal Pay Act § 3, 29 U.S.C. § 206(d) (1970), which requires that women receive pay equal to that provided to men for equivalent work, and Age Discrimination in Employment Act § 4(d), 29 U.S.C. § 626(d) (1970), which prohibits discrimination against persons aged forty to sixty-five on account of their ages. For a discussion of other methods available to challenge discriminatory employment practices, see notes 228-44 & accompanying text *infra*.

62. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-31 (1971). See generally Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972).

63. 42 U.S.C. § 2000e-3(a), as amended, (Supp. II, 1972).

Traditional NLRB Treatment of Discriminatory Practices by Unions or Employers

The Labor Board possesses the statutory authority both to resolve questions concerning the desire of employees in an appropriate unit to be represented by a particular labor organization for collective bargaining purposes and to decide unfair labor practice complaints. While exercising its responsibilities in these two areas, the NLRB has frequently had the opportunity to consider the ramifications of discriminatory practices under the NLRA, and many of its pronouncements regarding this issue antedated the enactment of Title VII.

Representation Authority of Labor Board

The general statutory authority of the Labor Board regarding the determination and regulation of representation questions is defined in section 9 of the NLRA.⁶⁴ When a petition is filed with the NLRB indicating that a number of employees desire to be represented by a labor organization, the Labor Board must decide several questions. First, assuming the petition has been accompanied by evidence demonstrating sufficient employee interest in representation,⁶⁵ the NLRB must determine whether a unit appropriate for collective bargaining representation has been designated.⁶⁶ The Labor Board must thereafter conduct a secret ballot election, and if the election has been untainted by improper campaign tactics, it must certify the results thereof.⁶⁷ If a majority of the eligible voters have favored representation, their employer will be obligated to bargain collectively and in good faith with their designated representative.⁶⁸ The Labor Board must finally decide when and under what circumstances the authorization of a bargaining representative may be forfeited or revoked.

"Through its powers to conduct and regulate representation elections, to certify unions as exclusive statutory bargaining representatives and to compel employers to bargain with unions, the board has . . . weapons that may be used to great advantage against racial discrimination."⁶⁹ Although the NLRB has occasionally exercised its authority in this regard, its actions have certainly left much to be desired.

64. 29 U.S.C. § 159 (1970).

65. See NLRA §§ 9(c), (e), 29 U.S.C. §§ 159(c), (e) (1970). The petition must also satisfy the timeliness requirements of the NLRA. *Id.* § 159(c)(3).

66. NLRA § 9(b), 29 U.S.C. § 159(b) (1970). See also *id.* § 159(c)(5).

67. *Id.* § 159(c).

68. NLRA §§ 8(a)(5), (d), 29 U.S.C. §§ 158(a)(5), (d) (1970).

69. Rosen, *supra* note 61, at 788; see Albert, *NLRB-FEPC?*, 16 VAND. L. REV. 547, 549, 558-71 (1963) [hereinafter cited as Albert]; Boyce, *Racial Discrimination*

Since almost the time of its inception, the NLRB has refused to consider race as a criterion for determining whether a designated unit would be appropriate for collective bargaining representation.⁷⁰ The Labor Board thus recognized that unit demarcations based solely upon racial considerations were improper. Furthermore, the Labor Board has made it clear that appeals to racial prejudice during an election campaign will not be countenanced, and the cases have unequivocally viewed such appeals as appropriate bases for setting aside the results of elections.

We take it as datum that prejudice based on color is a powerful emotional force. We think it also indisputable that a deliberate appeal to such prejudice is not intended or calculated to encourage the reasoning faculty.

. . . .

The Board does not intend to tolerate as "electoral propaganda" appeals or arguments which can have no purpose except to inflame the racial feelings of voters in the election.⁷¹

and the *National Labor Relations Act*, 65 NW. U.L. REV. 232, 234-36 (1970) [hereinafter cited as Boyce]; Herring, *The "Fair Representation" Doctrine: An Effective Weapon Against Union Racial Discrimination?*, 24 MD. L. REV. 113, 158-62 (1965) [hereinafter cited as Herring]; Sherman, *supra* note 61, at 782-85; Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563, 594-604 (1962) [hereinafter cited as Sovern].

70. See, e.g., *Andrews Indus. Inc.*, 105 N.L.R.B. 946 (1953); *Norfolk So. Bus. Corp.*, 76 N.L.R.B. 488 (1948); *F.S. Royster Guano Co.*, 71 N.L.R.B. 1465 (1947); *Foley Lumber & Export Corp.*, 70 N.L.R.B. 73 (1946); *Colorado Fuel & Iron Corp.*, 67 N.L.R.B. 100 (1946); *Larus & Brother Co.*, 62 N.L.R.B. 1075 (1945); *United States Bedding Co.*, 52 N.L.R.B. 382 (1943); *Southern Wood Preserving Co.*, 37 N.L.R.B. 25 (1941); *Aetna Iron & Steel Co.*, 35 N.L.R.B. 136 (1941); *Georgia Power Co.*, 32 N.L.R.B. 692 (1941); *Interstate Granite Corp.*, 11 N.L.R.B. 1046 (1939); *Union Envelope Co.*, 10 N.L.R.B. 1147 (1939); *American Tobacco Co.*, 9 N.L.R.B. 597 (1938).

71. *Sewel Mfg. Co.*, 138 N.L.R.B. 66, 71 (1962). See also Albert, *supra* note 69, at 565-81; Bok, *The Regulation of Campaign Tactics in Representative Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 67-74 (1964); Fuchs & Ellis, *Title VII: Relationship and Effect on the National Labor Relations Board*, 7 B.C. IND. & COM. L. REV. 575, 575-84 (1966); Sachs, *The Racial Issue as an Anti-union Tool and the National Labor Relations Board*, 14 LAB. L.J. 849 (1963); Comment, *Employee Choice and Some Problems of Race and Remedies in Representative Campaigns*, 72 YALE L.J. 1243 (1963).

The fact that section 8(c) of the NLRA, 29 U.S.C. § 158(c) (1970), provides that "[t]he expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit," has not inhibited the Labor Board's revulsion to racial campaign appeals, since section 8(c) does not affect the authority of the NLRB to set aside representation elections. See *Metropolitan Life Ins. Co.*, 90 N.L.R.B. 935 (1950), *overruled on other grounds*, *National Furniture Mfg. Co.*, 106 N.L.R.B. 1300 (1953).

This does not mean, however, that racial issues may never be a proper campaign debate topic.

So long . . . as a party limits itself to *truthfully* setting forth another party's position on matters of racial interest and does not deliberately seek to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals, we shall not set aside an election on this ground.⁷²

Nevertheless, "the burden will be on the party making use of a racial message to establish that it was truthful and germane, and where there is doubt as to whether the total conduct of such party is within the described bounds, the doubt will be resolved against him."⁷³

The NLRB can also refuse to certify an elected labor organization where it is shown that the union will not represent all minority employees fairly.⁷⁴ Despite the fact that this approach might effectively prevent minority rights from being unfairly sacrificed to majority interests, "[t]he NLRB has consistently refused to deny certification even where it has appeared most probable that the winning union would violate its duty" to represent everyone fairly.⁷⁵

In *Larus & Brother Co.*,⁷⁶ the Labor Board noted that it will revoke a union's certification where it has in fact failed fully to represent the interests of all workers.⁷⁷ However, the union's certification was not actually revoked in *Larus*, since it had voluntarily relinquished its certified status prior to the time the Labor Board issued its decision.⁷⁸ Although the NLRB strongly re-emphasized its intention to revoke the certification of discriminating unions in its *Pioneer Bus*

72. Sewell Mfg. Co., 138 N.L.R.B. 66, 71-72 (1962) (emphasis in original).

73. *Id.* at 72.

74. See Herring, *supra* note 69, at 160-61; Sherman, *supra* note 69, at 784; Sov-ern, *supra* note 69, at 596-99.

75. Herring, *supra* note 69, at 161. See Sherman, *supra* note 61, at 784. But see Bekins Moving & Storage Co. of Florida, Inc., Case 12-RC-4352, 211 N.L.R.B. No. 7 (June 11, 1974); NLRB v. Mansion House Center Management Corp., 473 F.2d 471 (8th Cir. 1973) which indicate that the Labor Board may not use its certification authority to assist a union which engages in invidious discrimination.

76. 62 N.L.R.B. 1075 (1945).

77. For a discussion of a labor organization's duty of fair representation see text accompanying notes 111-51 *infra*.

78. See Hughes Tool Co., 104 N.L.R.B. 318, 329 (1953), wherein the Labor Board reiterated its willingness to revoke the certification of unions which breach their duty of fair representation. However, in *Hughes Tool*, the NLRB again refrained from ordering certification revocation, because it regarded the case as one of "first impression," involving a joint holder of the certification status which had not breached its obligation to the employees. *Id.* at 329. See also A.O. Smith Corp., 119 N.L.R.B. 621 (1957); Pittsburgh Plate Glass Co., 111 N.L.R.B. 1210 (1955).

decision,⁷⁹ it is disappointing to note that it has never actually revoked a labor organization's certification due to racial discrimination.⁸⁰

Over the years, the Labor Board has developed the so-called "contract bar" doctrine which is intended to protect stable bargaining relationships. Under this doctrine, once an agreement has been signed by an employer with an incumbent union, another labor organization cannot petition to represent the employees covered by that contract until either its expiration or the passage of a reasonable period of time after its execution—now held to be three years—whichever is earlier.⁸¹ Needless to say, this rule provides incumbent unions with significant protection. However, should the incumbent labor organization breach its duty of fair representation during the life of an existing agreement by unfairly discriminating against minority workers, it will forfeit the protection furnished by the "contract bar" doctrine.⁸² This weapon may well provide a meaningful incentive for weak unions to avoid discriminatory practices, but, as is true of all the antidiscrimination measures utilized by the Labor Board under its section 9 representation authority, it does not significantly affect powerful labor organizations.⁸³

A labor union does not require NLRB certification as a prerequisite to a fruitful collective bargaining relationship. Therefore, so long as the organization possesses sufficient economic power to induce an employer voluntarily to recognize and to negotiate with it, a union may successfully exist without any representation approval from the Board. Because of this consideration, the NLRB must avail itself of other methods, if it desires to influence those unions which are practically immune to its representation authority.

Unfair Labor Practice Authority of Labor Board

Under section 10 of the NLRA⁸⁴ the Labor Board is empowered "to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce."⁸⁵ For many years, the

79. *Pioneer Bus Co.*, 140 N.L.R.B. 54 (1962).

80. *Herring*, *supra* note 69, at 158.

81. *General Cable Corp.*, 139 N.L.R.B. 1123 (1962).

82. *Jno. H. Swisher & Son*, 209 N.L.R.B. No. 1 (Feb. 14, 1974); *Pioneer Bus Co.*, 140 N.L.R.B. 54, 55 (1962); *Albert*, *supra* note 69, at 563-65.

83. *See Boyce*, *supra* note 69, at 236; *Herring*, *supra* note 69, at 162.

84. 29 U.S.C. § 160 (1970).

85. Employer unfair labor practices are defined in NLRA § 8(a), 29 U.S.C. § 158(a) (1970), while those pertaining to labor organizations are delineated in NLRA § 8(b), 29 U.S.C. § 158(b) (1970). Only those provisions which are directly relevant to the scope of this article will be carefully examined here.

NLRB has utilized its unfair labor practice authority to proscribe various acts of discrimination practiced by both employers and unions. Although a few writers have opposed the Labor Board's endeavors in this regard, particularly in light of the enactment of Title VII's pervasive antidiscrimination provisions in 1964,⁸⁶ it is believed that the NLRB should continue, and even increase, its vigilant efforts to eradicate employment discrimination.

Title VII should not be considered to have pre-empted the NLRA with respect to discriminatory practices which affect rights expressly protected by the Labor Act. At the time of the enactment of Title VII, the Justice Department clearly recognized this point.

Nothing in Title VII or anywhere else in [the Civil Rights Act of 1964] affects rights and obligations under the N.L.R.A. . . . Of course, Title VII is not intended to and does not deny to any individual, rights and remedies which he may pursue under other Federal and State statutes. *If a given action should violate both Title VII and the National Labor Relations Act, the National Labor Relations Board would not be deprived of jurisdiction* Title VII would have no effect on the duties of an employer or labor organization under the N.L.R.B. . . .⁸⁷

It should also be emphasized that not only does the Civil Rights Act of 1964 contain a general disclaimer of pre-emption of state law,⁸⁸ but Title VII contains its own disclaimer provisions with respect to state remedies.⁸⁹ Furthermore, Senator Tower's proposal to amend Title VII to provide that its remedial procedures would constitute the exclusive federal administrative means to challenge alleged employment discrimination was soundly defeated.⁹⁰ It is therefore quite un-

86. See, e.g., Kammholz, *Civil Rights Problems in Personnel and Labor Relations*, 53 ILL. BAR. J. 464, 465-66 (1965); Sherman, *supra* note 61; Note, *Labor Law: Applicability of Unfair Labor Practices to Racial Discrimination: Enforcement Under Civil Rights Act: Independent Metal Workers*, 147 N.L.R.B. No. 106 (July 1, 1964), 50 CORNELL L. REV. 321, 327-30 (1965); Comment, 78 HARV. L. REV. 679 (1965); Note, *Unfair Representation As an Unfair Labor Practice*, 63 MICH. L. REV. 1081, 1089 (1965).

87. 110 CONG. REC. 7207 (1964) (statement prepared for Senator Clark by the Justice Dep't) (emphasis added).

88. 42 U.S.C. § 2000h-4 (1970).

89. 42 U.S.C. § 2000e-7 (1970).

90. See 110 CONG. REC. 13650-52 (1964). The proposed amendment would have provided as follows: "[Title VII] shall constitute the exclusive means whereby any department, agency, or instrumentality in the executive branch of the Government or any independent agency of the United States, may grant or seek relief from, or pursue any remedy with respect to, any employment agency, labor organization, or joint labor-management committee covered by this title, if such employment practice may be the subject of a charge or complaint filed under this title." A similar amendment was rejected in connection with the 1972 E.E.O. Act. See H.R. 9247, 92nd Cong., 1st Sess. (1971).

derstandable why the courts have thus far recognized the continuing unfair labor practice jurisdiction of the Labor Board in cases involving racial discrimination.⁹¹ This judicial trend will most likely persist, thus permitting the NLRB to sustain its efforts to protect employees covered by the NLRA from the discriminatory practices of both employers and unions.

Discrimination and Employer Action

It is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of the N.L.R.A."⁹² The Labor Board has traditionally applied this provision to improper employer appeals to racial prejudice. While such appeals generally arose during a representation campaign and frequently provided the basis for an order setting aside the election,⁹³ they have also been found to constitute unfair labor practices.

In *Planters Manufacturing Co.*,⁹⁴ the Labor Board concluded that employer attempts to incite racial prejudice among the workers for the purpose of causing some to terminate their union membership violated section 8(a)(1).⁹⁵ Similar violations were found where employers stated: (1) that a particular union would not be friendly to blacks;⁹⁶ (2) that blacks would not be treated as well by the campaigning union as by management;⁹⁷ (3) that "if the CIO got in the plant, it would be fulla negroes";⁹⁸ and (4) that if the plant were organized, it would

91. See *United Packinghouse Workers v. NLRB*, 416 F.2d 1126, 1133-34 n.11 (D.C. Cir.), cert. denied, 396 U.S. 903 (1969); *Local 12, United Rubber Workers v. NLRB*, 368 F.2d 12, 24 (5th Cir. 1966), cert. denied, 389 U.S. 837 (1967). See also Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOKLYN L. REV. 62, 94-96 (1964); Fuchs & Ellis, *supra* note 71, at 597-99; Hickey, *Government Regulation of Union Racial Policies*, 7 B.C. IND. & COM. L. REV. 191, 230 (1966); Leiken, *The Current and Potential Equal Employment Role of the NLRB*, 1971 DUKE L.J. 833; Rosen, *Division of Authority Under Title VII of the Civil Rights Act of 1964: A Preliminary Study in Federal-State Interagency Relations*, 34 GEO. WASH. L. REV. 846, 886-89 (1966).

92. NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1) (1970). The text of NLRA § 7, 29 U.S.C. § 157 (1970), is set forth in note 22 *supra*.

93. See notes 71-73 & accompanying text *supra*.

94. 10 N.L.R.B. 735 (1938), enforced, 105 F.2d 750 (4th Cir. 1939).

95. The language construed by the Board is now contained in NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1) (1970).

96. *Arcade-Sunshine Co.*, 12 N.L.R.B. 259 (1939), enforced as modified on other grounds, 118 F.2d 49 (D.C. Cir. 1940), cert. denied, 313 U.S. 567 (1941).

97. *California Cotton Oil Corp.*, 20 N.L.R.B. 540 (1940).

98. *S.K. Wellman Co.*, 53 N.L.R.B. 214, 222 (1943).

be run by blacks and Mexicans.⁹⁹ When section 8(c), which provides employers with broad free speech rights so long as no threats of reprisal or promises of benefit are included,¹⁰⁰ was added to the NLRA in 1947, it appeared that the Labor Board might significantly alter its unfair labor practice approach to racial appeal cases. It has not, however, really done so.¹⁰¹

Other practices by employers regarding racial issues may also be violative of the NLRA. In *New Negro Alliance v. Sanitary Grocery Co.*¹⁰² the Supreme Court expressly indicated that peaceful concerted activities by racial minorities for the purpose of encouraging a company to employ more minority workers constituted legitimate conduct.¹⁰³ This means that an employer may not generally interfere with concerted activities by employees which are aimed at achieving racial equality.¹⁰⁴ Furthermore, it is even quite possible that employ-

99. *Reeves Rubber, Inc.*, 60 N.L.R.B. 366 (1945), *enforced*, 153 F.2d 340 (9th Cir. 1946).

100. 29 U.S.C. § 158(c) (1970). The text is set forth in note 71 *supra*.

101. *See, e.g.*, *Robert Meyer Hotel Co.*, 154 N.L.R.B. 521 (1965), *enforced as modified*, 387 F.2d 603 (5th Cir. 1967) (threat to replace black employees with white workers); *Atkins Saw Div., Borg-Warner Corp.*, 148 N.L.R.B. 949 (1964) (threat that white employees would have to associate with blacks); *Boyce Mach. Corp.*, 141 N.L.R.B. 756 (1963) (statement that union would replace blacks if it won election); *Associated Grocers, Inc.*, 134 N.L.R.B. 468 (1961) (advertising for white replacements during black organizing campaign); *Empire Mfg. Corp.*, 120 N.L.R.B. 1300 (1968), *enforced*, 260 F.2d 528 (4th Cir. 1958) (claim that union would hire blacks). *But see* *Model Mill Co.*, 103 N.L.R.B. 1527 (1953), *enforced*, 210 F.2d 829 (6th Cir. 1954); *Happ Bros.*, 90 N.L.R.B. 1513 (1950), *enforcement denied on other grounds*, 196 F.2d 195 (5th Cir. 1952); *American Thread Co.*, 84 N.L.R.B. 593 (1949), *enforced*, 188 F.2d 161 (5th Cir. 1951). *See generally* *Albert*, *supra* note 69, at 581-86.

102. 303 U.S. 552 (1938).

103. The *New Negro Alliance* Court recognized that "[t]he desire for fair and equitable conditions of employment on the part of persons of any race, color, or persuasion, and the removal of discriminations against them by reason of their race or religious beliefs is quite as important to those concerned as fairness and equity in terms and conditions of employment can be to trade or craft unions or any form of labor organization or association." *Id.* at 561.

104. *See, e.g.*, *No. 18, Washington State Serv. Employees*, 188 N.L.R.B. 957 (1971); *Mason & Hanger-Silas Mason Co.*, 179 N.L.R.B. 434 (1969), *enforcement denied on other grounds*, 449 F.2d 425 (8th Cir. 1971), *cert. denied*, 405 U.S. 1066 (1972). *See also* *Advance Carbon Prods., Inc.*, 198 N.L.R.B. No. 106, 81 L.R.R.M. 1418 (1972), *enforced*, 489 F.2d 732 (9th Cir. 1974). Of course, if an individual employee acts *solely* for his own personal benefit and not in concert with any other employees, he is not protected by the NLRA. *See, e.g.*, *Standard Brands, Inc.*, 196 N.L.R.B. 1006 (1972); *Maietta Trucking Co.*, 194 N.L.R.B. 794 (1971). Where employees in question are represented by a labor organization, their right to engage in their own independent activity will usually be severely restricted. *See* text accompanying notes 153-201 *infra*, regarding the obligation of employees to refrain from taking action which would improperly derogate from the exclusive bargaining authority of their designated union representative.

ment discrimination per se will be found to be in violation of the NLRA.

In *United Packinghouse Workers v. NLRB*,¹⁰⁵ the D. C. Circuit concluded that "an employer's policy and practice of invidious discrimination on account of race or national origin is a violation of Section 8(a)(1)."¹⁰⁶ The Court recognized that in order to be in violation of section 8(a)(1), unjustified employment discrimination must be found to interfere with or to restrict employees' rights of concerted action guaranteed under section 7 of the act.¹⁰⁷ The D. C. Circuit concluded that employment discrimination based on race or national origin has such an impact.¹⁰⁸

This effect is twofold: (1) racial discrimination sets up an unjustified clash of interests between groups of workers which tends to reduce the likelihood and the effectiveness of their working in concert to achieve their legitimate goals under the Act; and (2) racial discrimination creates in its victims an apathy or docility which inhibits them from asserting their rights against the perpetrator of the discrimination. *We find that the confluence of these two factors sufficiently deters the exercise of Section 7 rights as to violate Section 8(a)(1).*¹⁰⁹

Although it is unclear what acts of employment discrimination by an employer will be covered by the *United Packinghouse Workers'* rationale,¹¹⁰ it is nevertheless important to recognize that NLRA protection may be available to minority workers against employer discrimination.

Union Duty of Fair Representation

Pursuant to the requirement of section 9(a) of the NLRA,¹¹¹ once a labor organization is selected as the bargaining agent by a ma-

105. 416 F.2d 1126 (D.C. Cir.), *cert. denied*, 396 U.S. 903 (1969).

106. *Id.* at 1138.

107. *Id.* at 1135.

108. *Id.*

109. *Id.* (emphasis in original); see *Tipler v. E.I. duPont de Nemours & Co.*, 443 F.2d 125, 129 (6th Cir. 1971).

110. See *Jubilee Mfg. Co.*, 202 N.L.R.B. No. 2, 82 L.R.R.M. 1482 (1973), where the Labor Board clearly indicated that it does *not* consider employment discrimination by an employer to constitute a per se violation of the NLRA, since "discrimination based on race, color, religion, sex, or national origin, standing alone . . . is not 'inherently destructive' of employees' Section 7 rights . . ." 82 L.R.R.M. at 1484. Although it recognized that some acts of discrimination by an employer could violate the Act, it refused to accept wholly the reasoning of the D.C. Circuit's *United Packinghouse Workers* decision. *Id.*; cf. *Pacific Maritime Ass'n* 799 N.L.R.B. No. 88, 85 L.R.R.M. 1389 (1974).

111. 29 U.S.C. § 159(a) (1970).

jority of employees, it is obligated to represent all of the workers in that unit, not just those who have supported it.¹¹² While this doctrine provides the union agent with what may be significant support, it also has the affect of imposing a representative upon the minority group of workers who do not necessarily desire such representation. Recognizing that a labor organization could utilize its statutory authority to retaliate against either those who opposed its selection or other unfavored groups, both the courts and the Labor Board had developed fair representation theories which are aimed at preventing such opprobrious conduct.¹¹³

Judicial Protection

In the landmark case of *Steele v. Louisville & Nashville Railroad Co.*,¹¹⁴ the Supreme Court held that the exclusivity principle, through which the Railway Labor Act¹¹⁵ provides a designated bargaining agent with the authority to represent all of the employees in the bargaining unit, imposes a correlative duty which requires the union to represent all of the unit employees fairly. The Court recognized that once a majority representative has been selected,

[T]he minority members of a craft are thus deprived by the statute of the right, which they would otherwise possess, to choose a representative of their own, and its members cannot bargain individually on behalf of themselves as to matters which are properly the subject of collective bargaining.¹¹⁶

The Court analogized the power of the representative to that of a legislature which is subject to constitutional limits designed to insure the equal protection of the rights of its constituency and noted further that

112. See text accompanying notes 153-201 *infra*, for an explication of the development and ramifications of the exclusivity doctrine.

113. See generally Aaron, *Some Aspects of the Union's Duty of Fair Representation*, 22 OHIO ST. L.J. 39 (1961); Blumrosen, *Legal Protection Against Exclusion from Union Activities*, 22 OHIO ST. L.J. 21 (1961); Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1957); Herring, *supra* note 69; Rosen, *Fair Representation, Contract Breach and Fiduciary Obligations: Unions, Union Officials and the Worker in Collective Bargaining*, 15 HASTINGS L.J. 391 (1964); Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 YALE L.J. 1327 (1958).

114. 323 U.S. 192 (1944).

115. 45 U.S.C. §§ 151-88 (1970), formerly, 44 Stat. 577 (1926), as amended, 48 Stat. 1185 (1934); 49 Stat. 1189 (1936); 54 Stat. 785, 786 (1940); 64 Stat. 1238 (1951); 78 Stat. 748 (1964); 80 Stat. 208 (1966). A labor organization selected pursuant to the Railway Labor Act is provided with the same authority to represent all of the workers in the unit as is a union under the protection of section 9(a) of the NLRA.

116. 323 U.S. at 200.

the absence of comparable safeguards with respect to federally sanctioned labor organizations could present constitutional problems.¹¹⁷

In an obvious effort to avoid the constitutional question, the Court extracted from the general Railway Labor Act provisions a congressional intent to impose upon the statutory representative a duty as exacting as that which the Constitution imposes upon a legislature, to protect equally the interests of those whom it represents.¹¹⁸ The selected labor organization was thus held duty-bound "to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them."¹¹⁹ Although rational distinctions between various groups of employees based upon relevant considerations were not prohibited, the *Steele* Court expressly noted that this discretion "does not include the authority to make . . . discriminations not based on such relevant differences."¹²⁰ More significant for purposes of this article, the Court, which was considering a case involving union discrimination against racial minorities, expressly ruled that "*discriminations based on race alone are obviously irrelevant and invidious.*"¹²¹

At the time of its *Steele* decision, the Court decided a companion case¹²² wherein it stated that:

The duties of a bargaining agent selected under the terms of the [NLRA] extend beyond the mere representation of the interests of its own group members. By its selection as bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially.¹²³

It is thus clear that both Railway Labor Act and NLRA unions are subject to the judicially recognized duty of fair representation.

In *Ford Motor Co. v. Huffman*,¹²⁴ the Supreme Court observed that while the duty of fair representation imposes some restrictions upon a bargaining agent's representative authority, that doctrine should

117. *Id.* at 198.

118. *Id.* at 202.

119. *Id.* at 203.

120. *Id.*

121. *Id.* (emphasis added); see *Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768, 774 (1952), wherein the Court noted that the Railway Labor Act "thus prohibits bargaining agents it authorizes from using their position and power to destroy colored workers' jobs in order to bestow them on white workers." See also *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210 (1944).

122. *Wallace Corp. v. NLRB*, 323 U.S. 248, 255 (1944). See also *Syres v. Oil Workers Local 23*, 350 U.S. 892, *rev'g* 223 F.2d 739 (5th Cir. 1955).

123. 323 U.S. at 255.

124. 345 U.S. 330 (1953).

not be utilized to limit unfairly a union's negotiating discretion. The Court noted that a negotiated agreement will inevitably affect various employees differently and that the satisfaction of all employees, therefore, could not be expected.¹²⁵ *Huffman* thus concluded:

A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.¹²⁶

The doctrine of fair representation does not apply merely during the actual negotiation of the collective bargaining agreement. It is equally applicable during the administration and interpretation of that contract.

Collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract. The bargaining representative can no more unfairly discriminate in carrying out these functions than it can in negotiating a collective agreement.¹²⁷

If an employee believes that his employer is not properly following the terms of a bargaining contract, he may, in the absence of a binding arbitration provision, bring suit under section 301 of the Taft-Hartley Act¹²⁸ to enforce his alleged rights.¹²⁹ Should the agreement contain a binding grievance-arbitration procedure for the resolution of contractual disputes, the employee will, as a prerequisite to his right to commence a section 301 action, first be required to exhaust the grievance machinery.¹³⁰ This requirement will be excused, however,

125. *Id.* at 338.

126. *Id.* See note 131 *infra*.

127. *Conley v. Gibson*, 355 U.S. 41, 46 (1957); see *Vaca v. Sipes*, 386 U.S. 171, 190 (1967); *Humphrey v. Moore*, 375 U.S. 335 (1964). Although the Supreme Court has appeared not to impose a stricter standard upon a union when it is merely administering an agreement rather than actually negotiating it, such an approach has been suggested. See *Blumrosen, The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship*, 6 MICH. L. REV. 1435 (1963). See also Comment, *Federal Protection of Individual Rights Under Labor Contracts*, 73 YALE L.J. 1215 (1964).

128. 29 U.S.C. § 185 (1970).

129. *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962). Where such actions are brought before state tribunals, federal substantive law applies. See *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962).

130. *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). This requirement is premised upon the strong federal policy which favors arbitration as the proper method for resolving contractual disputes. See *Boys Mkts., Inc. v. Local 770, Retail Clerks Union*, 398 U.S. 235 (1970); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. American*

when an employee contends that such an exercise would be fruitless due to the fact that his union representative is not fairly and adequately representing his interests.¹³¹

Although the judicial remedy initially provided by the *Steele* decision has been sought by hundreds of plaintiffs since 1944,¹³² the relief actually afforded has frequently left much to be desired.¹³³ One reason suggested for the paucity of satisfactory relief is the liberal discretion permitted to labor organizations.¹³⁴ Another weakness has been the cost of the judicial litigation process.¹³⁵ However, through its development of the theory that a breach of the fair representation doctrine may constitute an unfair labor practice, the Labor Board has helped to neutralize this latter factor.¹³⁶

Labor Board Protection

Although the *Steele* decision established the judicially-cognizable fair representation doctrine in 1944, it took eighteen years before the

Mfg. Co., 363 U.S. 564 (1960). See also Gregory, *Enforcement of Collective Agreements by Arbitration*, 48 VA. L. REV. 883 (1962); Meltzer, *The Supreme Court, Arbitrability and Collective Bargaining*, 28 U. CHI. L. REV. 883 (1962); Smith & Jones, *The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law*, 63 MICH. L. REV. 751 (1965).

131. See *Glover v. St. Louis-San Francisco Ry. Co.*, 393 U.S. 324 (1969); *Vaca v. Sipes*, 386 U.S. 171 (1967). It should be noted that the *Vaca* decision expressly indicated that an individual employee does not have the absolute right to have his grievance processed to arbitration. *Id.* at 191. The Court would clearly not imply a breach of a union's duty of fair representation merely because it decided not to proceed to arbitration, since "[a] breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Id.* at 190; see *id.* at 192-93.

132. See Herring, *supra* note 69, at 115. But see Sovern, *Race Discrimination and the National Labor Relations Act: The Brave New World of Miranda*, N.Y.U. 16TH CONF. ON LABOR 3, 5 (1963).

133. "In the twenty years since the *Steele* decision, Negro plaintiffs have claimed upwards of \$6,000,000 in compensatory and punitive damages. They have actually collected \$2,802 of the former and \$3,000 of the latter." Herring, *supra* note 69, at 144.

134. "Construed with such latitude the duty of fair representation has provided scant protection. The courts have applied a presumption of reasonableness which has virtually precluded a finding of breach." Comment, *Federal Protection of Individual Rights Under Labor Contracts*, 73 YALE L.J. 1215, 1234 (1964); see Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 YALE L.J. 1327, 1341 nn. 73 & 76 (1958).

135. See Albert, *supra* note 69, at 557-58; Rosen, *Fair Representation, Contract Breach and Fiduciary Obligations: Unions, Union Officials and the Worker in Collective Bargaining*, 15 HASTINGS L.J. 391, 399 (1964). See generally Herring, *supra* note 69, at 146-47.

136. In *Vaca v. Sipes*, 386 U.S. 171, 177-88 (1967), the Supreme Court recognized that both the NLRB and the courts could exercise concurrent jurisdiction over the fair representation area, thus precluding any preemption difficulties.

NLRB completely recognized that it possessed the statutory authority to utilize its unfair labor practice power to restrict racial discrimination and other similarly invidious practices by labor organizations.¹³⁷ In 1952, the NLRB general counsel indicated that he could discern nothing in the NLRA which made it an unfair labor practice for a union to bargain in an unfairly discriminatory manner.¹³⁸ In 1954 and again in 1956, the general counsel refused to issue unfair labor practice complaints where racial discrimination was allegedly either tolerated or supported by unions.¹³⁹ In 1958, however, the Labor Board affirmed, without meaningful comment, a decision of a trial examiner which strongly indicated, in dicta, that a union's breach of its duty of fair representation might constitute an unfair labor practice.¹⁴⁰ Finally, in 1962, the Labor Board completely and expressly embraced this theory.

In its *Miranda Fuel Co.* decision,¹⁴¹ a non-race case, the Board traced the historical development of the judicially-recognized fair representation doctrine and concluded "that Section 7 . . . gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment."¹⁴² It therefore determined that such opprobrious conduct by a labor organization violated section 8(b)(1)(A) of the NLRA.¹⁴³ Although the Second Circuit refused to enforce the *Miranda Fuel* decision, only one of three judges actually rejected the Labor Board's statutory analysis.¹⁴⁴

137. See Herring, *supra* note 69, at 153-54.

138. See Brief for NLRB as Amicus Curiae, *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).

139. Case No. K-311, 37 L.R.R.M. 1457 (1956); Case No. 1047, 35 L.R.R.M. 1130 (1954).

140. Textile Workers Local 229, 120 N.L.R.B. 1700 (1958).

141. 140 N.L.R.B. 181 (1962), *enforcement denied on other grounds*, 336 F.2d 172 (2d Cir. 1963).

142. 140 N.L.R.B. at 185.

143. 29 U.S.C. § 158(b)(1)(A) (1970), which provides: "(b) It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section [7]: *Provided*, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . ." See NLRA § 7, 29 U.S.C. § 157 (1970), set out in note 22 *supra*.

The NLRB also found a section 8(b)(2) violation by the union in its *Miranda Fuel* decision, since it concluded that a labor organization's attempt to cause an employer to derogate the employment status of an employee foreseeably had the effect of encouraging or discouraging union membership. See 29 U.S.C. § 158(b)(2) (1970). See also NLRA § (8)(a)(3), 29 U.S.C. § 158(a)(3) (1970).

144. *NLRB v. Miranda Fuel Co.*, 326 F.2d 172 (2d Cir. 1963). Judge Medina,

In *Independent Metal Workers, Local 1*,¹⁴⁵ the NLRB expanded upon its *Miranda Fuel* reasoning. The Board held that a labor organization which refused, for racially discriminatory reasons, to process the grievance of an employee breached its duty of fair representation and thereby committed an unfair labor practice.¹⁴⁶ *Independent Metal Workers, Local 1* was almost immediately followed by similar holdings in *Local 1367, International Longshoremen's Association*¹⁴⁷ and *Local 12, United Rubber Workers*,¹⁴⁸ which were affirmed on appeal. It thus, appeared that the Labor Board's use of its unfair labor practice authority to enforce a union's duty of fair representation—vis-a-vis racial minorities—was firmly established.

In addition to the board's *direct* authority to declare union discrimination to be violative of the NLRA, the NLRB's unfair labor practice power may be employed indirectly to thwart invidious discrimination by labor organizations. In *NLRB v. Mansion House Center Management Corp.*,¹⁴⁹ the Eighth Circuit ruled that the NLRB may not constitutionally order an employer to bargain with a certified bargaining representative which racially discriminates against those employees it purports to represent.¹⁵⁰ If the reasoning of the circuit

alone, believed that the Labor Board's per se approach to the statutory issue was incorrect and that an unfair labor practice could be found only where "discrimination was deliberately designed to encourage membership in the union." *Id.* at 180. Judge Lumbard, concurring in the denial of enforcement of the Board's order, found that there was insufficient evidence to support the Board's factual conclusions. He therefore concluded that there was no reason for the court to have considered the statutory question. *Id.* Judge Friendly, in dissent, supported the Labor Board's conclusions with respect to sections 8(b)(2) and 8(a)(3); however, he expressly refrained from consideration of the Labor Board's interpretation of section 8(b)(1). *Id.* at 180-86, 181 n.1.

145. 147 N.L.R.B. 1573 (1964).

146. The Labor Board found the same types of section 8(b)(1)(A) and 8(b)(2) violations as it had in *Miranda Fuel*. However, since it concluded that by improperly refusing to process the employee's grievance the union effectively breached its obligation to negotiate fairly for that worker, the Board also found a section 8(b)(3) violation. See 29 U.S.C. § 158(b)(3) (1970), which requires a labor organization to bargain in good faith regarding wages, hours, and other terms and conditions of employment. See also NLRA § 8(d), 29 U.S.C. § 158(d) (1970). The Board's reasoning would clearly indicate that union *inaction* for racial reasons can be just as violative of the NLRB as direct action. See Boyce, *supra* note 69, at 239.

147. 148 N.L.R.B. 897 (1964), *enforced*, 368 F.2d 1010 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967).

148. 150 N.L.R.B. 312 (1964), *enforced*, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967), *rehearing denied*, 389 U.S. 1060 (1968). See also *NLRB v. Local 1581, Int'l Longshoremen's Ass'n*, 489 F.2d 635 (5th Cir. 1974); *Teamsters, Local 568 v. NLRB*, 379 F.2d 137 (D.C. Cir. 1967).

149. 473 F.2d 471 (8th Cir. 1973). See Comment, 7 GA. L. REV. 770 (1973).

150. Although the Eighth Circuit's holding directly concerned its refusal to enforce a bargaining order of the NLRB issued against an employer which refused to ne-

court is accepted by the Labor Board and other tribunals, it may provide a significant weapon which can be utilized against discriminating unions.¹⁵¹

The "Exclusivity" Doctrine Under Section 9(a) of the NLRA¹⁵²

Individual Rights and Union Exclusivity

In *Virginian Railway Co. v. System Federation No. 40, Railway Employees*,¹⁵³ the Supreme Court examined the exclusivity provision of the Railway Labor Act which is analogous to section 9(a) of the NLRA. The Court ruled that the principle requiring an employer to negotiate with the majority representative as the exclusive agent of his employees also imposes the negative duty to refrain from bargaining with any other party. *Medo Photo Supply Corp. v. NLRB*¹⁵⁴ extended this doctrine to employers covered by the NLRA, as it denied

gotiate with an allegedly discriminating labor organization, it is important to note that the court's broad language could have far-reaching consequences. It certainly implied that the Labor Board may not constitutionally utilize any of its remedial or certification procedures to assist a union which invidiously discriminates against those it is required to represent. Cf. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

151. See also Jones, *Disestablishment of Labor Unions for Engaging in Racial Discrimination—A New Use for an Old Remedy*, 1972 WIS. L. REV. 351, wherein the author suggests that the NLRB order the disestablishment of discriminating labor organizations, just as it traditionally issued such orders against unions which were flagrantly dominated by employers. See NLRA § 8(a)(2), 29 U.S.C. § 158(a)(2) (1970) (proscription against employer support or domination of unions).

152. The exclusivity doctrine has been derived from the language of section 9(a) of the NLRA: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates or pay, wages, hours of employment, or other conditions of employment: Provided, that any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, that the bargaining representative has been given opportunity to be present at such adjustment." 29 U.S.C. § 159(a) (1970) (emphasis added). It should be noted that the exclusivity rights provided to a labor organization by section 9(a) are applicable whether it has been certified through the NLRB's election process or has merely been voluntarily recognized by an employer based upon a demonstration of majority employee support. See generally Hanslowe, *Individual Rights in Collective Labor Relations*, 45 CORNELL L.Q. 25 (1959); Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U.L. REV. 362 (1962) [hereinafter cited as Summers].

153. 300 U.S. 515, 548-49 (1937); see *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 346 (1944).

154. 321 U.S. 678 (1944).

them the right to bargain directly with their own employees where an exclusive negotiating representative had already been selected. In *Medo Photo*, the Court reasoned that direct bargaining between an employer and a minority or majority of the employees, in circumvention of the designated bargaining agent, would subvert the statutory right to collective bargaining guaranteed to all employees.¹⁵⁵ Furthermore, the Court indicated that the employer could not ignore its statutory obligations "even though the employees consent."¹⁵⁶

The Supreme Court has acknowledged that the exclusivity doctrine may in some cases adversely restrict the rights of individual employees, but it has recognized that furtherance of the federal labor policy favoring collective bargaining necessitates such a result.

The workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the majority rules, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result. We cannot except individual contracts generally from the operation of collective ones because some may be more individually advantageous. Individual contracts cannot subtract from collective ones¹⁵⁷

However, the fact that individual rights are generally subordinate to the will of the majority does not mean that individual employees are helpless. The fair representation doctrine,¹⁵⁸ which was developed to protect employees from the tyranny of unfair majorities, "has stood as a bulwark to prevent arbitrary union conduct against individuals

155. *Id.* at 684; see S. REP. NO. 573, 74th Cong., 1st Sess. 13 (1935), wherein it was stated that the majority rule concept of the NLRA clearly implies "that employers shall not interfere with the practical application of the right of employees to bargain collectively through chosen representatives by bargaining with individuals or minority groups in their own behalf, after representatives have been picked by the majority to represent all"

156. 321 U.S. at 687. Such direct negotiations by an employer with his own employees in disregard of the rights of the majority representative constitute a violation of section 8(a)(5) of the NLRA which defines the duty of the employer to bargain in good faith with the designated agent. NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5) (1970).

157. *J.I. Case Co. v. NLRB*, 321 U.S. 332, 339 (1944). "National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967). See also Dunau, *Employee Participation in the Grievance Aspect of Collective Bargaining*, 50 COLUM. L. REV. 731, 735 (1950) [hereinafter cited Dunau].

158. See text accompanying notes 111-56 *supra*.

stripped of traditional forms of redress by the provisions of federal labor law."¹⁵⁹ Moreover, the proviso to section 9(a), which permits individual employees or groups of employees to adjust grievances with their employer directly, provides workers with some additional protection.

"[A] collective bargaining representative's control over individual employees does not end with the consummation of the bargaining agreement, but continues thereafter through its power to process grievances"¹⁶⁰ Nevertheless, since the enactment of the Wagner Act in 1935, Congress has provided individual employees and groups of employees with certain grievance-adjusting authority of their own. The original proviso to section 9(a) stated only that "any individual employee or group of employees shall have the right at any time to present grievances to their employer."¹⁶¹ However, in 1947, the Taft-Harley Act¹⁶² amended the proviso to section 9(a) of the NLRA, by adding the following words:

and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given the opportunity to be present at such adjustment.

This modification clearly restricted the right of employees to resolve grievances on their own. No adjustment may conflict with the terms of an existing agreement.¹⁶³ In addition, the right provided to individuals only concerns the adjustment of "grievances," and nothing further.

A grievance in labor relations parlance is commonly defined as any complaint, real or imaginary, which causes a worker to be dis-

159. *Vaca v. Sipes*, 386 U.S. 171, 182 (1967).

160. Note, *Racial Discrimination and the NLRB: The Hughes Tool Case*, 50 VA. L. REV. 1221, 1224 (1964). NLRA § 8(d), 29 U.S.C. § 158(d) (1970), defines the duty to bargain collective as "the performance of the mutual obligation of the employer and the representative . . . to . . . confer in good faith with respect to [among other things] any question arising [under a collective bargaining agreement]." See Dunau, *supra* note 157, at 746; see also *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).

161. NLRA § 9(a), ch. 372, § 9(a), 49 Stat. 453 (1935). See *Hughes Tool Co. v. NLRB*, 147 F.2d 69 (5th Cir. 1945).

162. Labor-Management Relations Act § 101, 29 U.S.C. § 159(a) (1970).

163. If an employer were to agree with an individual employee to something which contravened the terms of the collectively bargained contract, he would be guilty of an unfair labor practice. *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944); see *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944). Furthermore, in *Hotel Employers' Ass'n*, 47 Lab. Arb. 873 (1966), the arbitrator refused to enforce an individually negotiated "agreement" which conflicted with the bargained contract.

satisfied with any incident of his job, but in its *legal sense*, a grievance may in general be confined to (1) a claim founded upon a collective agreement, (2) a claim resting upon a job right existing independently of a collective agreement, and (3) *a minimum job irritant capable of correction without essentially affecting the status quo. Any complaint calling for the formation or change of employment terms is excluded from the ken of a grievance.*¹⁶⁴

Therefore, individual efforts aimed at restructuring the employment relationship for many employees is clearly not protected by the language of the proviso.¹⁶⁵ It should finally be noted that while "an inexperienced or ignorant griever can ask a more experienced friend to assist him . . . he cannot present his grievance through any union except the representative."¹⁶⁶

Although the proviso to section 9(a) may provide many employees with a meaningful right, it will not usually be of significant benefit to minority workers who are endeavoring to achieve what they consider to be racial justice in employment. Most of their efforts will necessarily be directed at encouraging their employer to modify generally the working conditions of most, if not all, of the employees in the bargaining unit, and it is quite obvious that such actions would clearly transcend the scope of "grievance"-adjusting protection afforded by the proviso. These workers must therefore seek NLRA protection through some other statutory provision or risk the possibility that their actions will be wholly unprotected.

164. Dunau, *supra* note 157, at 736 (emphasis added); see *West Texas Util. Co. v. NLRB*, 206 F.2d 442, 446-48 (D.C. Cir.), *cert. denied*, 346 U.S. 855 (1953); *Hughes Tool Co. v. NLRB*, 147 F.2d 69, 72-73 (5th Cir. 1945). See also *Elgin, Joliet, & E. Ry. v. Burley*, 325 U.S. 711, 724 (1945); *Summers, supra* note 152, at 377; Note, *Individual Control Over Personal Grievances Under Vaca v. Sipes*, 77 YALE L.J. 559, 562 (1968).

165. See Note, *Federal Protection of Individual Rights Under Labor Contracts*, 73 YALE L.J. 1215, 1218 (1964). The reason for the distinction between "grievances" and "collective bargaining" is quite apparent. "When all that is at stake is a personal grievance of an individual employee, the threat to industrial peace is not comparable to its counterpart during the negotiation of the collective agreement." Note, *Individual Control Over Personal Grievances Under Vaca v. Sipes*, 77 YALE L.J. 559, 564 (1968).

166. *Hughes Tool Co. v. NLRB*, 147 F.2d 69, 73 (5th Cir. 1945); see *NLRB v. Lundy Mfg. Corp.*, 316 F.2d 921, 925 (2nd Cir.), *cert. denied*, 375 U.S. 895 (1963). In light of the fact that section 2(5) of the NLRA, 29 U.S.C. § 152(5) (1970), very broadly defines the term "labor organization" to include "any organization of any kind . . . in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes . . . or conditions of work," it should be apparent that many groups which are not normally regarded as being "labor organizations" would thus be prohibited from directly assisting minority workers with their individual efforts to adjust grievances with their employer. See *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959), regarding the extremely broad scope of the section 2(5) definition.

Minority Action Versus Union Exclusivity

Peaceful concerted activity by employees aimed at achieving racial equality¹⁶⁷ or other conditions of employment is generally protected.¹⁶⁸ However, when such action has the effect of derogating from the exclusive authority of a designated bargaining representative, it may lose the protection of the Labor Act.¹⁶⁹ To understand the often hypertechnical and ephemeral distinctions and demarcations which have been drawn regarding this difficult area, one must chronologically trace the evolution of leading cases dealing with the subject.

In the *International Envelope*¹⁷⁰ case, the Labor Board considered a situation involving employees¹⁷¹ covered by a collective bargaining agreement who briefly left their work stations to talk with their employer in an effort, independent of their union, to induce him to change their remuneration basis from an hourly rate to a salary-type system. As a result, the workers were terminated, and the board upheld the employer's action.

[The] contract provided orderly methods for settling grievances and other disputes through duly designated representatives of the employees. The three discharged men took it upon themselves to make a demand upon the employer . . . which would change the terms of the existing contract The Union was not only the statutory representative of the discharged employees by virtue of Section 9(a) of the Act, but they had themselves designated it as their representative by becoming members. When the Union was unable to effectuate their desires, the discharged employees decided to take matters into their own hands. The Union, as the authorized representative of all the employees disapproved of the action of the minority group Under such circumstances, when a dissident minority group takes action contrary to the terms of an existing contract and contrary to the wishes of the duly designated representative . . . disciplinary action by the employer . . . is clearly justified. *To rule otherwise would be to permit self-appointed dissenting groups within a union to ignore or to defy the legally designated representative, to take matters into their*

167. See notes 102-04 & accompanying text *supra*.

168. See NLRA § 7, 29 U.S.C. § 157 (1970), set out in note 22 *supra*.

169. See generally Cox, *The Right to Engage in Concerted Activities*, 26 IND. L.J. 319 (1951) [hereinafter cited as Cox]; Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U. PA. L. REV. 1195 (1967) [hereinafter cited as Getman]; Gould, *The Status of Unauthorized and "Wildcat" Strikes Under the National Labor Relations Act*, 52 CORNELL L.Q. 672 (1967); Lieken, *supra* note 91.

170. *International Envelope Corp.*, 34 N.L.R.B. 1277 (1941).

171. The workers involved were apparently "supervisory" personnel, but until NLRA § 2(3), 29 U.S.C. § 152(3) (1970), was amended in 1947 to exclude expressly "supervisors" from the statutory definition of the term "employee," such workers were covered by the act's provisions.

*own hands, to destroy the collective agreements negotiated by the majority organizations, and to undermine the process of collective bargaining itself.*¹⁷²

Subsequent appellate court decisions, dealing with relatively similar conduct in contravention of the position of a bargaining representative, have generally accepted the fundamental rationale of the *International Envelope* decision.

In the *Draper*¹⁷³ case, the Fourth Circuit ruled on the use of unauthorized concerted action in support of the labor organization's bargaining position. During new contract negotiations, the employer continuously utilized what appeared to be dilatory tactics. Finally, an exasperated group of employees, without the knowledge of their union, engaged in a peaceful work-stoppage to force their employer to bargain. Their subsequent discharges were sustained by the court, which concluded that such unauthorized "wildcat" strikes contravened the major purpose underlying the enactment of the NLRA, namely, the prevention of unnecessary interference with the free flow of commerce.¹⁷⁴ Such action was also found to be in violation of the exclusivity principle.

Minority groups must acquiesce in the action of the majority and the bargaining agent they have chosen; and, just as a minority has no right to enter into separate bargaining arrangements with the employer, so it has no right to take independent action to interfere with the course of bargaining which is being carried on by the duly authorized bargaining agent chosen by the majority.¹⁷⁵

Thus, even where the peaceful, but unauthorized, activity is intended to support and strengthen the bargaining posture of the union representative it has been found to be unprotected. Other circuits have concluded similarly that individual employee freedom is pre-empted by the need for procedural stability.¹⁷⁶

The basic *Draper* rationale was followed by the Seventh Circuit in the *Harnischfeger* case¹⁷⁷ which involved one important distinguishing feature. There the unprotected "wildcat" strike was not suppor-

172. 34 N.L.R.B. at 1282-83 (emphasis added).

173. NLRB v. *Draper Corp.*, 145 F.2d 199 (4th Cir. 1944).

174. *Id.* at 203; see NLRA § 1, 29 U.S.C. § 151 (1970).

175. 145 F.2d at 203 (emphasis added).

176. See *Lee A. Consaul Co. v. NLRB*, 469 F.2d 84 (9th Cir. 1972); *NLRB v. Cactus Petroleum, Inc.*, 355 F.2d 755 (5th Cir. 1966); *NLRB v. Sunbeam Lighting Co.*, 318 F.2d 661 (7th Cir. 1963); *NLRB v. Sunset Minerals, Inc.*, 211 F.2d 224 (9th Cir. 1954), each following the basic rationale of *Draper*. It is important to note that even the 1947 Taft-Hartley Congress expressly approved of the Fourth Circuit's *Draper* holding. See H.R. REP. No. 245, 80th Cong., 1st Sess. 27 (1947).

177. *Harnischfeger Corp. v. NLRB*, 207 F.2d 575 (7th Cir. 1953).

tive of the union's bargaining position, but rather was intended to alter the labor organization's approach. The court had no difficulty in deciding that the dissident employees' direct interference with the bargaining position of their selected representative was not protected by the NLRA.

The *Plasti-Line*¹⁷⁸ case concerned employees who engaged in unauthorized concerted activity *during* the term of a collective bargaining agreement to indicate their displeasure with the manner in which their union was processing a particular grievance. The court, noting that the dissenting group struck in "direct defiance of the purpose of the Act under which they [sought] redress,"¹⁷⁹ utilized the *Draper* reasoning to uphold their terminations. Further, the court expressly ruled that the proviso to section 9(a) of the act did not afford protection to such disruptive action, since such an approach "would be to hold that a minority group may lawfully strike whenever a grievance is decided in a manner which does not satisfy such minority group."¹⁸⁰ Notwithstanding this line of authority, some unauthorized concerted activities have been accorded NLRA protection.

*Western Contracting Corp. v. NLRB*¹⁸¹ provided the Tenth Circuit with a factual situation somewhat analogous to that in the *Draper* case, but the court reached the opposite conclusion. The workers engaged in a spontaneous work stoppage to protest the lack of heaters in the employer's trucks. Although their union had not authorized the action, it was in full sympathy with such activity, since it had itself previously endeavored to obtain heaters for the vehicles. Furthermore, unlike the *Draper* situation, a *majority* of the employees approved of and participated in the strike.¹⁸² The Tenth Circuit relied upon this majority support and the fact that the union had not actually been negotiating the heater issue at the time of the work stoppage to distinguish the *Draper* holding. It approvingly quoted the reasoning utilized by the Labor Board to afford the workers section 7 protection.

If the position taken by the employees is contrary to that of their bargaining representative, the bargaining process itself may there-

178. *Plasti-Line, Inc. v. NLRB*, 278 F.2d 482 (6th Cir. 1960).

179. *Id.* at 485.

180. *Id.* at 487.

181. 322 F.2d 893 (10th Cir. 1963).

182. The applicable collective bargaining agreement did not contain a no-strike provision. *Id.* at 896. Needless to say, work stoppages in breach of negotiated contracts are not protected. See *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71 (1953); *NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1939).

by be impaired or destroyed But a position taken by the employees in support of that of their bargaining representative creates no such threat. The demand of the employees in this case and of the Union which represented them was one and the same.

. . . .

The employees were entitled to engage in concerted action so long as such action was not in violation of their contract or in derogation of the position taken by their bargaining agent. The action here was clearly in support of rather than in derogation of the union's position.¹⁸³

The factual circumstances in the *R. C. Can*¹⁸⁴ case were virtually identical to those in *Draper*, yet statutory protection was again provided to the dissonant group. Some of the workers were not satisfied with the progress of the negotiations taking place between the union and their employer, and eight out of approximately fifty unit employees engaged in a brief, but unauthorized¹⁸⁵ work stoppage intended to force their employer to bargain more meaningfully with their union.

The Fifth Circuit perceived a basic antagonism between the employer's need to deal with a single spokesman for the employees and the ideally democratic character of a union.¹⁸⁶ The court nevertheless believed that there was a workable test for the balancing of these competing policies:

In these conflicting policies, there may be found a basis for resolution: *is the action of the individuals or a small group in criticism of, or opposition to, the policies and actions theretofore taken by the organization? Or, to the contrary, is it more nearly in support of the things which the union is trying to accomplish?* If it is the former, then such devisive, dissident action is not protected. [citing *Draper*, *Harnischfeger*, and *Plasti-Line*] . . . If, on the other hand, it seeks to generate support for and an acceptance of the demands put forth by the union, it is protected *so long, of course, as the means used do not involve a disagreement with, repudiation or criticism of, a policy or decision previously taken by the union*. Such as, for example, a no strike pledge, a cooling off period, or the like during negotiation. [citing *Western Contracting*]¹⁸⁷

183. 322 F.2d at 896-97, 899. It is important to remember that the type of issue involved in the *Western Contracting* case did not really lend itself to resolution through contractual grievance machinery. Thus the employees who engaged in the work stoppage were not endeavoring to circumvent any provision of their agreement.

184. *NLRB v. R.C. Can Co.*, 328 F.2d 974 (5th Cir. 1964).

185. The union had informally decided not to strike at that time. However, while a representative of the labor organization informed the strikers that he wished that they had not walked out, he still indicated to them his belief that their action was "protected." *Id.* at 977.

186. *Id.* at 978-79.

187. *Id.* at 979 (emphasis added).

The court concluded that the employer "was not put in the position of choosing between the demands of the Union and the demands of [the] strikers" due to the fact that the strikers wholly supported their labor organization's position.¹⁸⁸ It therefore found that their action warranted NLRA protection.

In *NLRB v. Tanner Motor Livery, Ltd.*,¹⁸⁹ the Ninth Circuit considered the fate of black employees who had engaged in unauthorized concerted activity aimed at altering their employer's allegedly discriminatory employment policies. Although the dissident workers had apparently not attempted to act through their bargaining representative before engaging in their concerted action, the Labor Board had decided to afford them statutory protection. The Board had concluded that by endeavoring to alleviate "what they deemed to be a morally unconscionable, if not an unlawful, condition of employment," the black employees had not acted in derogation of their bargaining agent.¹⁹⁰

The Ninth Circuit observed that although the employees' picketing had been "in support of a highly desirable objective . . . this fact should not be permitted, per se, to obscure the question."¹⁹¹ It also noted the NLRB's presumption that the dissident employee action was in support of the union's substantive position which was derived from the fact that the union's statutory duty of fair representation would not permit it to tolerate racial discrimination.¹⁹² Nonetheless, the court found the unauthorized activity to be unprotected on the ground that the minority group's failure initially to attempt to resolve the matter through the designated bargaining representative violated the exclusivity principle of the Labor Act.¹⁹³

In *NLRB v. Shop Rite Foods, Inc.*,¹⁹⁴ the Fifth Circuit reconsidered the ramifications of the broad language contained in its *R. C. Can* decision. The *Shop Rite* case involved an unauthorized walk-out by

188. *Id.* See also *NLRB v. Rubber Rolls, Inc.*, 388 F.2d 71, 73 (3rd Cir. 1967).

189. 419 F.2d 216 (9th Cir. 1969). See also *NLRB v. Tanner Motor Livery, Ltd.*, 349 F.2d 1 (9th Cir. 1965).

190. *Tanner Motor Livery, Ltd.*, 166 N.L.R.B. 551 (1967).

191. 419 F.2d at 217.

192. *Id.* at 219.

193. *Id.* at 221. Since there was no allegation that the union had not been representing the interests of the minority employees fairly, the court expressly refrained from deciding whether such a fair representation breach would legally permit them to engage in otherwise unprotected concerted activity. *Id.* See also *Sunbeam Corp.*, 184 N.L.R.B. No. 117, 74 L.R.R.M. 1712 (1970), *aff'd sub nom.*, *Moore v. Sunbeam Corp.*, 79 L.R.R.M. 2803 (7th Cir. 1972).

194. 430 F.2d 786 (5th Cir. 1970).

a group of employees which occurred during collective bargaining aimed at reaching an agreement. However, the strike was only indirectly related to the negotiations, since it was aimed at protesting the discharge of an employee who had apparently been caught damaging company merchandise in an effort to induce the employer to accept the union's bargaining demands. When they initially learned of the employee's termination, several workers went to the company manager's office to protest the action. Their lack of success in this regard was followed by a spontaneous work stoppage. Immediately after their strike commenced, the participants proceeded to the union hall to confer with the union field representative who told them to continue their picketing while he sought to obtain official strike sanction from the union district director. Unfortunately for the strikers, this authorization was refused. Several days later, after the strikers were informed that their work stoppage was unauthorized, they sought reinstatement, but were denied reemployment.

The Fifth Circuit accepted the Labor Board's finding that the strikers had effectively been terminated on the day they initially walked out, but it rejected the Board's decision to afford them NLRA protection based upon the reasoning of the *R. C. Can* decision. The *Shop Rite* court initially distinguished *R. C. Can* by noting that the strikers there were supporting a very specific union position which had been previously communicated to the employer through the negotiation process.¹⁹⁵ The court warned:

If union objectives are characterized in general terms—such as wages, job security, conditions of employment and the like—one can assume that in a great majority of instances minority action will be consistent with one or more of those objectives. If *R. C. Can* is not applied with great care, it would allow minority action in a broad range of situations and permit unrestrained undercutting of collective bargaining.¹⁹⁶

However, the court next cited the Fifth Circuit's intervening *Cactus Petroleum*¹⁹⁷ decision which had ignored *R. C. Can* in favor of the *Draper* rationale, and it indicated its belief that "*R. C. Can* is of doubtful validity."¹⁹⁸ In addition, the court reasoned that "[t]he failure of the [dissident] group . . . to notify their bargaining representative that they desired to contest [the other employee's] discharge could only undermine the goals of democracy in the unions and effective

195. *Id.* at 790.

196. *Id.*

197. *NLRB v. Cactus Petroleum, Inc.*, 355 F.2d 755, 761 (5th Cir. 1966).

198. 430 F.2d at 790-91.

labor adjustment through the bargaining process.”¹⁹⁹ On the basis of this observation, the court sustained the employer’s refusal to grant the strikers reinstatement.

The final case to be considered in this section is *NLRB v. Universal Services, Inc. & Associates*.²⁰⁰ In *Universal Services*, several workers who were dissatisfied with certain action by their employer decided to engage in a strike, even though their union had implemented the grievance machinery regarding the matter and had warned them that such a walk out was against the rules. The court, in deciding that this unauthorized conduct was not protected by the NLRA stressed the need for “union solidarity and cohesiveness.”²⁰¹

[R]epresentatives were ready and willing to speak for the men, and they informed the men “as best they could” that the grievances raised were being dealt with, and were optimistically appraised by the union. . . .

Any doubt that the men had at this critical point should have been resolved in favor of the union leadership. . . .

. . . .

The freedom of action withheld from the individual laborer in a case of this nature is more than compensated by a resultant strengthening of the negotiating position of the collective whole. And, upon the strength of the group vis-a-vis the employer rests the ultimate security of the individual workers.²⁰²

Analysis of D.C. Circuit Holding

The *Emporium* court majority endeavored to harmonize its decision with the established line of precedent regarding the exclusivity doctrine. In so doing, it acknowledged that the picketers’ conduct essentially rendered the remedial provisions of the collective bargaining agreement ineffective; however, it concluded that the degree of interference with the exclusive, bargaining status of the union was not sufficient to deprive the concerted activities of the protection of the act.²⁰³ This determination rested on three factors: (1) the minority resorted to independent concerted activity only after having presented their grievances to the union representative; (2) the minority abandoned the pending grievance procedure after the union had declined to proceed on a “group” basis; and (3) the union and the mi-

199. *Id.* at 791.

200. 467 F.2d 579 (9th Cir. 1972).

201. *Id.* at 585-88.

202. *Id.*

203. *Western Addition Community Org. v. NLRB*, 485 F.2d 917, 931 (D.C. Cir. 1973).

nority were working for a common purpose—elimination of racial discrimination in employment.²⁰⁴

From the foregoing historical development of the major cases dealing with unauthorized employee conduct in derogation of the "exclusivity" status of collective bargaining representatives, it should be quite apparent that the *Emporium* decision actually constitutes a significant departure from the weight of judicial precedent. Notwithstanding the fact that the union and the minority faction both sought the same objective, the picketer's activity disrupted the collective bargaining process. Under the more widely accepted view, this factor is sufficient in itself to justify the denial of NLRA protection.²⁰⁵

In its *Emporium* decision, the D. C. Circuit majority announced a novel test to be applied by the Labor Board in evaluating the protected nature, under the NLRA, of *unauthorized* concerted activity directed against alleged employment discrimination.

[T]he Labor Board should inquire . . . whether the union was actually remedying the discrimination to the *fullest extent possible, by the most expedient and efficacious means*. Where the union's efforts fall short of this high standard, the minority group's concerted activities cannot lose its [sic] section 7 protection.²⁰⁶

Thus, the *Emporium* majority further deviated from precedent by shifting the focus of analysis from the effect of a minority group's activity to the conduct of the labor organization. Moreover, in its zealous effort to be innovative, the D. C. Circuit majority apparently ignored the fact that the NLRB is only empowered to interpret and apply the statutory provisions of the NLRA.

For an administrative agency which owes its very existence to the statutory expression of congressional intent to enter upon grounds not intended for it seems a clear breach of the administrative function. An administrative agency does not have the traditional power of a court to fashion for itself, and for those over whom it presides, abstract concepts of right and wrong. Administrative agencies are created to execute and administer the congressional will as expressed, not to decide what Congress should have said.²⁰⁷

With this guiding principle in mind, the relevant provisions of the NLRA should first be examined to discern whether the D. C. Circuit's holding comports with the basic policies underlying the Congressional enactment of that Act.

204. *Id.*

205. See text accompanying notes 167-202 *supra*.

206. 485 F.2d at 931 (emphasis in original).

207. Note, *Racial Discrimination and the NLRB: The Hughes Tool Case*, 50 VA. L. REV. 1221, 1235 (1964).

Relevant NLRA Policies

Two vital considerations which were recognized by the D. C. Circuit majority should be mentioned at the outset. First, although the dissident Emporium employees asserted that they had merely been seeking the opportunity to discuss "grievances" with their employer, the court expressly accepted the finding of the trial examiner that their actions involved "no mere presentation of a grievance, but nothing short of a demand that [the Company] bargain with the picketing employees for the entire group of minority employees."²⁰⁸ It is therefore apparent that the protection which might otherwise have been provided them by the proviso to section 9(a) could not be availed upon, since their actions substantially transcended the narrow "grievance" right afforded by that proviso.²⁰⁹ The court also acknowledged the fact that there was "nothing in the record . . . to indicate that the union's decision to remedy the charges of discrimination by proceeding on an individual rather than a group or class basis was made in bad faith. The union may well have thought that it had chosen the most efficacious method to handle the charges"²¹⁰ For this reason, it is clear that the court was not concerned with any possible union breach of its duty of fair representation.²¹¹ Thus, the court was not affording the minority workers protection based upon any theory of "self defense" against unfair labor practice violations by their statutory representative.

It has been recognized that "labor legislation is peculiarly the product of legislative compromise of strongly held views" and that an NLRA provision "must be construed in light of the fact that it is only one of many interwoven sections in a complex act."²¹² When section 7²¹³ is examined in this light, it becomes apparent that the *Emporium* court's effort to provide unionized, minority protesters with statutory protection is not supportable by NLRA considerations. It

208. 485 F.2d at 929 n.34.

209. See notes 160-66 & accompanying text *supra*.

210. 485 F.2d at 930. It must be remembered that not only had the union negotiated a broad no-discrimination clause, but it was also endeavoring to enforce this provision through the grievance-arbitration machinery when the dissident minority group decided to withdraw its needed assistance from the union effort, in favor of unauthorized action which it believed would produce more rapid results. It is indeed ironic to observe the extreme cost and delay which has occurred as a result of the dissident's decision.

211. See text accompanying notes 111-51 *supra*.

212. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 179 (1967). See *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 619-20 (1967).

213. 29 U.S.C. § 157 (1970), set out in note 22 *supra*.

is both contrary to the legislative history of the act and inconsistent with important policies embodied in that enactment.

The NLRA was certainly not intended to prohibit general employment discrimination. "The NLRA is primarily concerned with the protection of the workers' right to self-organization—and with racial discrimination only to the limited extent that it interferes with that right."²¹⁴ The legislative history of the Labor Act makes this point quite clear. During the debates surrounding the passage of the Wagner Act in 1935, many civil rights groups protested the fact that no direct protection was afforded to minority employees.²¹⁵ The meager Taft-Harley debates regarding the employment discrimination area also demonstrate the Congressional desire not to become involved with this issue.²¹⁶ Furthermore, efforts in 1953 to have the NLRA amended to proscribe general employment discrimination were wholly unsuccessful.²¹⁷ A similar effort in 1964 was similarly defeated, in favor of the enactment of Title VII.²¹⁸ Therefore, unless some specific NLRA provision may be construed as providing minority dissidents with protection, it is quite apparent that the Labor Act itself does not help them.

Although concerted employee activity aimed at the alleviation of employment discrimination is generally legitimate conduct²¹⁹ which may not be interfered with by employer action,²²⁰ it must be remembered that such group efforts are *not absolutely* protected. When they violate some other basic Federal labor policy, their protection will be forfeited.

The exclusivity principle embodied in section 9(a) of the act makes it expressly clear that employees who are represented by a designated bargaining agent may not engage in unauthorized concerted activity which undermines the protected status of their representative and which disrupts the stable bargaining relationship exist-

214. Note, *Title VII, the NLRB, and Arbitration: Conflicts in National Labor Policy*, 5 GA. L. REV. 313, 343 (1971). "[T]he seminal purpose of the NLRB is to protect workers' rights to bargain collectively and not to prevent racial discrimination." *Id.* at 348; see 29 U.S.C. §§ 158(a)(3), (b)(2) (1970).

215. See Albert, *supra* note 69, at 550-51.

216. See *id.* at 551-52.

217. S. 1831, 83d Cong., 1st Sess. (1953). Although referred to the Committee on Labor and Public Welfare, it was never reported out. 99 CONG. REC. 4437 (1953). See Sherman, *supra* note 61, at 808.

218. See Sherman, *supra* note 61, at 808.

219. See *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938).

220. See cases cited note 104 *supra*.

ing between their union and employer.²²¹ It should be realized that the types of activity sanctioned by the *Emporium* court's holding would negate important congressional objectives expressed in the exclusivity doctrine. Furthermore, other specific statutory provisions would be abrogated.

As both the Labor Board and the D. C. Circuit recognized, the *Emporium* employees sought the right to *negotiate* for minority workers separately from their selected bargaining representative.²²² Such action, if protected, would place the employer in a completely untenable position, and it would wholly ignore the rights of the other employees. If the employer were to refuse to bargain with the dissident faction, he would face the prospect of economic injury perpetrated by their continued concerted activity.²²³ On the other hand, if the employer were to recognize and negotiate with the minority group regarding employment conditions, he would be guilty of an unfair labor practice for bargaining with other than the designated representative,²²⁴

221. See generally text accompanying notes 152-201 *supra*.

222. See 192 N.L.R.B. at 185, 77 L.R.R.M. at 1671; 485 F.2d at 929 n.34.

223. It is interesting to note the *Emporium* court's apparent unawareness of the possibility that the concerted activity utilized by the dissident workers in that particular case may well have constituted a breach of the contractual no-strike provision. Such a breach by regular employees is clearly unprotected under the NLRA. See *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71 (1953); *NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1939). See also *Getman*, *supra* note 169, at 1248. The court similarly ignored the fact that the consumer boycott may have violated the accepted principle that an employer is not obligated to continue to employ workers who wish to receive pay while engaging in quasi-strike activities aimed at injuring their employer. See *Hoover Co. v. NLRB*, 191 F.2d 380, 390 (6th Cir. 1951): "It is a wrong done to the company for employees, while being employed and paid wages by a company, to engage in a boycott to prevent others from purchasing what their employer is engaged in selling and which is the very thing their employer is paying them to produce. An employer is not required, under the Act, to finance a boycott against himself." See *NLRB v. Montgomery Ward & Co.*, 157 F.2d 486 (8th Cir. 1946).

The *Emporium* court may also have improperly failed to consider specific NLRA provisions which may quite arguably have applied to that case. For example, the dissident's demand that they negotiate only with the *Emporium* president, even though he instructed them to talk with the personnel director, may have violated NLRA § 8(b)(1)(B), 29 U.S.C. § 158(b)(1)(B) (1970), which guarantees an employer the unfettered discretion to select whomever he chooses to be his bargaining representative. Furthermore, NLRA § 8(b)(7)(A), 29 U.S.C. § 158(b)(7)(A) (1970), and § 8(b)(4)(C), 29 U.S.C. § 158(b)(4)(C) (1970), expressly protect an employer from picketing and other coercive activity where he has already granted legal recognition to a labor organization. See *Black Power*, *supra* note 6, at 72-77.

It is certainly hoped that the D. C. Circuit did not mean to imply that minority dissidents are to be provided with *carte blanche* when protesting alleged employment discrimination, irrespective of such established NLRA limitations.

224. The employer would be in violation of NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5) (1970). See *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944).

and the rights of the majority of employees who originally selected a labor organization as their bargaining agent would be violated.²²⁵ Thus, in the absence of some evidence demonstrating that the majority workers *and* the employer are acting invidiously to injure the minority employees, it is believed that NLRA protection with respect to such minority action is both unnecessary and improper.

Although the protection provided to minority protestors under the D. C. Circuit's decision could easily result in a serious disruption of the federal policy favoring orderly collective bargaining through exclusive representatives, such a result might be justifiable if such minorities had no other effective means available to adequately enforce their recognized right to non-discriminatory employment.²²⁶ However, with a virtual plethora of non-disruptive avenues of relief available to minority employees,²²⁷ such a holding is indefensible.

Non-Disruptive Remedial Alternatives

Probably the first avenues of relief which the *Emporium* court should have recognized in a case involving the interpretation and application of the NLRA are the remedies available under that act. It was the D. C. Circuit itself which enunciated the rationale rendering discrimination by an employer acting alone an unfair labor practice.²²⁸ Furthermore, should the bargaining representative fail to endeavor in good faith to alleviate any invidious employment discrimination, it would clearly breach its duty of fair representation, and relief could be obtained from either a judicial forum²²⁹ or the NLRB.²³⁰

Certainly the most widely used and most expedient method of eliminating employment discrimination, where there is a collective bar-

225. See *International Ladies Garment Workers Union v. NLRB*, 366 U.S. 731 (1961), wherein the Court recognized the impropriety of an employer granting bargaining recognition to a minority union, even where the union and the employer are acting in good faith and with no intention to disenfranchise the majority workers improperly.

226. See Note, *Western Addition Community Organization v. NLRB*, 87 HARV. L. REV. 656, 664 (1974). See also Note, *Title VII and NLRA: Protection of Extra-Union Opposition to Employment Discrimination*, 72 MICH. L. REV. 313, 330-31 (1973).

227. "Remedies in some areas, such as employment discrimination on account of race or sex, run like water." Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination*, 39 U. CHI. L. REV. 30 (1971) [hereinafter cited as Meltzer].

228. See *United Packinghouse Workers v. NLRB*, 416 F.2d 1126 (D.C. Cir. 1969), cert. denied, 396 U.S. 903 (1969). See notes 105-10 & accompanying text *supra*.

229. See text accompanying notes 114-36 *supra*.

230. See text accompanying notes 137-51 *supra*.

gaining representative, is the contractual grievance-arbitration process.²³¹ At least 94 percent of the negotiated contracts in the United States provide for binding arbitration as the dispute resolution procedure.²³² In addition, "the growing practice of incorporating non-discrimination clauses into collective agreements and the demonstrated willingness of arbitrators to enforce such clauses augurs well"²³³ Even where the agreement does not contain an express no-discrimination clause, other provisions, such as the "just cause" for discharge requirement, may be utilized to prevent invidious discrimination.²³⁴ A few arbitrators will even incorporate Title VII principles into the collective agreement.²³⁵ Of course, the availability of arbitration relief is usually dependent upon the commitment of labor organizations to oppose discriminatory practices, since only they usually possess the contractual authority to invoke this remedial procedure.²³⁶ However, the fair representation duty²³⁷ will usually encourage unions to resolve doubts in favor of proceeding to arbitration rather than risk liability for failure to act. Furthermore, while some have questioned the ability of white-dominated unions to present fairly the cases of disadvantaged minorities,²³⁸ it is interesting to note "the relatively few reported cases in which arbitration awards have been challenged in Title VII proceedings."²³⁹ With this significant remedial channel available, it

231. This is the dispute settlement procedure favored under the NLRA. See NLRA § 203(d), 29 U.S.C. § 173(d) (1970). The NLRB not only gives deference in unfair labor practice cases to *prior* arbitration awards covering the same basic issues, Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955), but it will even hold its proceedings in abeyance pending resolution of the question by a future arbitration decision. Collyer Insulated Wire, 192 N.L.R.B. 837 (1971); Dubo Mfg. Corp., 142 N.L.R.B. 431 (1963); see Revised Memorandum of NLRB General Counsel Nash on Arbitration Deferral Policy Under Collyer, 4 CCH LAB. L. REP. ¶ 9031 (1973). See also Johansen & Smith, *Open Sesame to Deferral*, 23 LAB. L.J. 723 (1972); Note, *The NLRB's Arbitration Deferral Policy under Collyer: The Impact of National Radio Co.*, 53 B.U.L. REV. 711 (1973); Note, *The NLRB and Deference to Arbitration*, 77 YALE L.J. 1191 (1968). However, the fact that an employee has received an unfavorable arbitration award does not preclude resort to the Labor Board's unfair labor practice processes in all cases. See, e.g., Westinghouse Electric Corp., 162 N.L.R.B. 768 (1967); Raytheon Co., 140 N.L.R.B. 883 (1963).

232. BNA, [1970] LABOR RELATIONS YEARBOOK 38.

233. Rosen, *supra* note 58, at 749 & cases cited note 85 *supra*; see Peck, *supra* note 58, at 483.

234. See Peck, *supra* note 58, at 483.

235. See Note, *The Authority and Obligation of a Labor Arbitrator*, 32 OHIO ST. L. REV. 395 (1971). But see *Labor Arbitration*, *supra* note 60, at 47.

236. See Peck, *supra* note 58, at 483.

237. See text accompanying notes 111-51 *supra*.

238. See *Labor Arbitration*, *supra* note 60, at 46-47.

239. Meltzer, *supra* note 227, at 50; see Comment, *Final Determination Through*

is clear that economic coercion during the term of the negotiated contract should not be permitted.²⁴⁰

Aside from NLRA and arbitration relief, many other administrative or judicial remedies are available. Thirty-eight states have Fair Employment Practice Commissions which may afford a worker relief against employment discrimination.²⁴¹ Effective assistance is also provided by the broad discrimination proscription of Title VII.²⁴² The Civil Rights Act of 1866 may also be utilized by individuals who have suffered from racial discrimination practiced by employers or unions.²⁴³ It should finally be noted that if the employer involved has any direct or indirect contractual relations with the Federal Government, the anti-discrimination relief provided by the Office of Federal Contract Compliance under Executive Order 11246 might be available.²⁴⁴

Despite the availability of all of these nondisruptive means of obtaining relief from employment discrimination, the *Emporium* court

Arbitration of Employee's Claim of Discrimination Does Not Preclude Title VII Action, 45 N.Y.U.L. REV. 1316, 1317 (1970). It is now clear that a prior arbitration award will not bar a subsequent title VII suit. See *Alexander v. Gardner-Denver*, 94 S. Ct. 1011 (1974). Furthermore, independent of a minority employee's right to file a subsequent title VII suit challenging both employer action underlying the arbitration proceeding and a union's discriminatory handling of his grievance, a worker may also file suit against both the employer and the labor organization under section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185 (1970). See *Vaca v. Sipes*, 386 U.S. 171 (1967). See also *Glover v. St. Louis-San Francisco Ry. Co.*, 393 U.S. 324 (1969).

240. The presence of a binding grievance-arbitration procedure for the resolution of contractual disputes impliedly imposes a no-strike obligation upon the employees. See *Gateway Coal Co. v. United Mine Workers of America*, 94 S. Ct. 629, 639; *Teamsters, Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962). See also *Boys Mkts., Inc. v. Retail Clerks, Local 770*, 398 U.S. 235 (1970); *Cox*, *supra* note 169, at 329.

241. See *Peck*, *supra* note 58, at 491-94; Note, *Implementing Governmental Policy Against Racial Discrimination in Employment*, 23 FLA. L. REV. 157, 158-59 & n.12 (1970).

242. See notes 61-63 & accompanying text *supra*.

243. "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pain, penalties, taxes, licenses, and exactions of every kind, and to no other." 42 U.S.C. § 1981 (1970) (emphasis added); see *Waters v. Wisconsin Steel Works of Int'l Harvester Co.*, 427 F.2d 476, 482-83 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970); *Peck*, *supra* note 58, at 475-79. See also *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

244. Exec. Order No. 11246, 3 C.F.R. 339 (1967); see *Peck*, *supra* note 58, at 489-91; Note, *Executive Order 11246: Anti-Discrimination Obligations in Government Contracts*, 44 N.Y.U.L. REV. 590 (1969).

maintained that the NLRA, when read in conjunction with the principles underlying Title VII, should be interpreted as protecting unauthorized, concerted activity aimed at alleged racial discrimination in employment.²⁴⁵ It is believed, however, that the principles evidenced in Title VII do not require such a result.

Title VII Considerations

Although the discretion provided to a Federal administrative agency by its enabling legislation "does not necessarily include either the duty or the authority to execute numerous other laws," in applying its own enactment, an agency cannot "wholly ignore other . . . equally important Congressional objectives."²⁴⁶ Thus, when two different legislative enactments basically regulate the same general area, an effort should be made, where possible, to harmonize the underlying policies of both so that the objectives of *neither* act are unnecessarily sacrificed. In its apparent desire to achieve a predetermined result, the *Emporium* court ignored the fact that such an effort requires reciprocal consideration of the principles and policies of both enactments. Unless the activity in question has been expressly authorized and specifically protected by Title VII, the Labor Board should not be expected to negate substantial NLRA policies automatically merely because the particular participants in the challenged action are acting in the noble name of employment justice.²⁴⁷ Furthermore, it must be remembered that Title VII, while boldly proscribing the most pervasive forms of invidious employment discrimination, certainly did *not* sanction all *means* which private individuals might select to achieve the desired objective.

The most relevant provision of Title VII is section 704(a),²⁴⁸ which provides *inter alia*:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter. . .

245. See *Western Addition Community Org. v. NLRB*, 485 F.2d 917, 926-29 (D.C. Cir. 1973). "[T]he Board should have recognized that in light of Title VII, concerted activity involving racial discrimination is quite distinct from other concerted activity." *Id.* at 928.

246. See text accompanying notes 1-2 *supra*.

247. See Note, *Title VII and NLRA: Protection of Extra-Union Opposition to Employment Discrimination*, 72 MICH. L. REV. 313, 326 (1973).

248. 42 U.S.C. § 2000e-3(a) (1970). See also 42 U.S.C. § 2000e-2(a)(1) (1970), which proscribes all employment discrimination based upon race, color, religion, sex, or national origin. See authorities cited note 61 *supra*.

However, there is nothing in the record of the *Emporium* case to indicate that the employer had terminated the two dissidents because they *opposed* his alleged discriminatory practices. His decision was instead based upon the *manner* in which they expressed their opposition. Not even the specific language of section 704(a)—let alone the general language of any NLRA provision—permits the utilization of any means to challenge alleged discrimination. In *Green v. McDonnell Douglas Corp.*,²⁴⁹ the Eighth Circuit expressly recognized that through section 704(a), "Congress sought to protect employees and job applicants from employer retaliation for filing complaints to the EEOC Without doubt, *lawful protest* also commands the same protection, but we find no *suggestion that protection extends to activities which run afoul of the law.*"²⁵⁰ Although *Green* was vacated by the Supreme Court on appeal, it is important to note that the Eighth Circuit's interpretation of section 704(a) was not challenged.²⁵¹ Nonetheless, the Supreme Court gratuitously stated that section 704(a) "relates solely to discrimination against an applicant or employee on account of his participation in *legitimate* civil rights activities or protests" ²⁵² Perhaps even more important is the fact that the Supreme Court expressly recognized that "[n]othing in Title VII compels an employer to absolve and rehire one who has engaged in . . . deliberate, unlawful activity against it."²⁵³ In support of this principle, the Court cited a case denying NLRA protection to employees who had engaged in unlawful conduct.²⁵⁴ The Court's reasoning suggests that NLRA policies should be considered when deciding whether to provide Title VII protection for particular activity. Thus, such established Labor Board doctrines as the exclusivity principle should not be ignored merely because a minority is protesting alleged employment discrimination.

Another incongruous aspect of the *Emporium* court's decision concerns the manner in which the D. C. Circuit effectively reversed the burdens of proof under both Title VII and the NLRA. Unless a labor organization is endeavoring to alleviate alleged discrimination "to the *fullest extent possible, by the most expedient and effica-*

249. *Green v. McDonnell Douglas Corp.*, 463 F.2d 337 (8th Cir. 1972).

250. *Id.* at 341 (emphasis added).

251. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 797 n.6 (1973).

252. *Id.* at 799 (emphasis added).

253. *Id.* at 803.

254. The case cited was *NLRB v. Fansteel Corp.*, 306 U.S. 240 (1939), wherein the Court upheld the right of an employer to discharge workers who had engaged in a sit-down strike.

cious means,"²⁵⁵ it would be forced to forfeit its right to be free from divisive and disruptive dissension. Notwithstanding the difficulty of comprehending the meaning of the court's extremely vague language, it is relatively clear that a union will be required to demonstrate the sufficiency of its remedial efforts in order to retain its "exclusivity" protection. Yet, under both Title VII²⁵⁶ and the NLRA,²⁵⁷ it is the charging party who must establish the improper conduct of the defending party. The court unfortunately failed to provide a convincing explanation for this burden of proof reversal.

If it could be established that the vast majority of labor organizations fail to act properly to rectify invidious employment discrimination, the *Emporium* court's implicit ruling might not be too unreasonable. However, while many unions have had undistinguished civil rights records,²⁵⁸ many others have taken forceful action to eradicate this pernicious problem.²⁵⁹ It is therefore wholly impermissible to establish such a general presumption against the good faith of all labor organizations.²⁶⁰

[A] union's hostility toward its civil rights conscious members in no way establishes its hostility to the goal of non-discrimination. It is quite possible for the union to take the most severe measures against various types of independent action such as wildcat strikes and yet be in total agreement with a policy which would remedy the irritations or injustices which gave rise to the stoppage.²⁶¹

The *Emporium* court's effort to impose upon unions an adverse presumption which transcends any standard established under Title VII cannot be sustained under the fundamental principles of either Title VII or the NLRA.²⁶² The D. C. Circuit's attempt to "harmo-

255. *Western Addition Community Org. v. NLRB*, 485 F.2d 917, 931 (D.C. Cir. 1973) (emphasis in original).

256. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Hutchings v. United States Indus., Inc.*, 428 F.2d 303, 310 (5th Cir. 1970).

257. See *Vaca v. Sipes*, 386 U.S. 171, 193-95 (1967); *First Nat'l Bank v. NLRB*, 413 F.2d 921, 925 (8th Cir. 1969).

258. See *Sovern*, *supra* note 69, at 565.

259. See *id.* at 566; *Rosen*, *supra* note 61, at 758.

260. See *Teamsters, Local 357 v. NLRB*, 365 U.S. 667, 676 (1961), wherein the Court held that it could "not assume that a union conducts its operations in violation of law" See also *Cleveland Bd. of Educ. v. LaFleur*, 94 S. Ct. 791, 798 (1974).

261. *Black Power*, *supra* note 6, at 60.

262. The *Emporium* court apparently excused the fact that the minority dissidents caused most of the problems for the labor organization with respect to its utilization of the grievance-arbitration machinery by refusing to provide needed cooperation when things did not progress exactly as they desired. Cf. *Patmon v. Van Dorn Co.*, 6 F.E.P. Cases 821 (N.D. Ohio 1973), in which the court granted the defendants' motion for summary judgment in a fair representation suit where the unions processed the com-

nize" these two enactments has really effectuated the policies of neither act, while doing violence to the underlying tenets of both.²⁶³

Constitutional Considerations

Although the Labor Board is basically not a "fair employment" agency, it is an administrative branch of the federal government. It may not, therefore, engage in any action which affirmatively supports invidious discrimination by private parties.²⁶⁴ For this reason, "the Board cannot validly render aid under Section 9 of the [Labor] Act to a labor organization which discriminates racially when acting as a statutory bargaining representative."²⁶⁵ Since the collective bargaining authority and concomitant "exclusivity" protection provided to unions emanate from section 9(a) of the NLRA,²⁶⁶ it would certainly violate established constitutional principles for the NLRB to protect actively the representative status of labor organizations which practice

plainant's grievance to the point where his own refusal to cooperate prevented the unions from proceeding further.

263. It should be noted that if the Supreme Court were to eschew the analysis of this article in favor of that developed by the D. C. Circuit, several important policy issues would have to be resolved. For example: (1) may the self-designated minority "agent" represent all minority workers, or may he only speak for those who have specifically authorized him; (2) may such an "agent" represent minority workers with respect to any areas of interest to such individuals, or must he confine his negotiations to matters of direct and particular interest to minority employees; (3) would such an "agent" be under at least a quasi-fair representation duty vis-a-vis those minority workers he does represent; and (4) would the agent be under any fair representation obligation with respect to the non-minority employees in the general bargaining unit who might be affected by any minority agreement reached.

264. See *Shelley v. Kraemer*, 334 U.S. 1 (1948). See also *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Hurd v. Hodge*, 334 U.S. 24 (1948); cf. *Moose Lodge No. 107 v. Iris*, 407 U.S. 163 (1973). See generally *Wellington, The Constitution, the Labor Union and "Governmental Action,"* 70 *YALE L.J.* 345 (1961). See also *Henkin, Shelley v. Kraemer: Notes for a Revised Opinion*, 110 *U. PA. L. REV.* 473 (1962).

265. *Independent Metal Workers, Local 1*, 147 *N.L.R.B.* 1573, 1577 (1964). "When a governmental agency recognizes such a [discriminatory] union to be the bargaining representative it significantly becomes a willing participant in the union's discriminatory practices. Although the union itself is not a government instrumentality the National Labor Relations Board is." *NLRB v. Mansion House Center Management Corp.*, 473 F.2d 471, 473 (8th Cir. 1973); see *Pioneer Bus Co.*, 140 *N.L.R.B.* 54 (1962); *Weiss, Federal Remedies for Racial Discrimination By Labor Unions*, 50 *GEO. L.J.* 457, 458-75 (1962); Note, *Union Racial Discrimination: A Liberalized Standard of Proof*, 58 *MINN. L. REV.* 335 (1973). See also *St. Antoine, Color Blindness But Not Myopia: A New Look at State Action, Equal Protection, and "Private" Racial Discrimination*, 59 *MICH. L. REV.* 993 (1961); Note, *NLRB v. Mansion House Center Management Corp.*, 7 *GA. L. REV.* 770, 776-81 (1973).

266. See Note, *Administrative Enforcement of the Right to Fair Representation: The Miranda Case*, 112 *U. PA. L. REV.* 711, 712 & n.13 (1964).

illegal discrimination. However, this fact does not support a result as broad as that enunciated by the D. C. Circuit.

In its *Emporium* decision, the circuit court imposed upon labor organizations an affirmative obligation substantially exceeding that previously recognized by any federal court. Although the Supreme Court has not yet specifically considered the precise question raised in the *Emporium* case, it has on several occasions addressed itself to the fair representation duty which is a constitutional prerequisite to the enjoyment of the statutory protection of the NLRA.²⁶⁷ In *Steele*, the Court held that a union is duty-bound "to exercise fairly the power conferred upon it in behalf of all those for whom it acts, *without hostile discrimination against them*."²⁶⁸ Surely this standard which automatically prohibits any discrimination based upon racial or other similarly invidious distinctions²⁶⁹ satisfies constitutional requirements. Therefore, unless there is some demonstration that a labor organization is failing to prosecute the grievances of minority workers fully and fairly, or is otherwise shirking its representational obligations, it should not be capriciously deprived of its exclusive representative status. This is true regardless of the actions which an employer may have taken.

The *Emporium* court may well have imposed its strict standard not so much in response to any unfair representation by the union, but more in an effort to deny the allegedly discriminating employer the right to terminate the dissident protesters. Although this might at first blush appear to be a reasonable attempt to require the Labor Board to deny the protection of the NLRA to a possibly discriminating party, it overlooks two crucial factors. The first concerns the fact that the employer in the *Emporium* case was *not* in any manner seeking protection of the Act or the assistance of the NLRB when it discharged the two protesting employees. The employer obviously believed that the workers' openly expressed disloyalty and total disregard for the contractually-established method for peaceful resolution of employment disputes warranted dismissal. Thus, it is clear that only the protesters themselves sought the affirmative assistance of the federal agency, and by its denial of relief, the NLRB clearly did not become unconstitutionally enmeshed in any discriminatory scheme.

The second vital consideration relates to the fact that the exclusivity principle applied by the Labor Board to uphold the *Emporium*

267. See notes 114-21 & accompanying text *supra*.

268. *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 203 (1944) (emphasis added).

269. See *id.* at 203.

discharges only indirectly assists the employer. While he is an incidental beneficiary of this policy, it must be remembered that its primary functions are to protect the rights of the majority employees who originally selected the union as their bargaining representative and to protect the general public against easily avoidable and inexcusable interruptions of commerce. Therefore, except in those instances where it can be shown that the minority workers are not being treated fairly by the majority employees or are being improperly represented by the designated negotiating agent, a court should be most hesitant to abrogate the established "exclusivity" doctrine merely in order to punish an allegedly discriminating employer. Since the *Emporium* court conceded both that there was no evidence to indicate any bad faith on the part of the union involved and that that organization may in fact have proceeded in the manner which it reasonably believed would produce the optimal and most lasting results,²⁷⁰ the court's decision is certainly not sustainable on constitutional grounds.²⁷¹

Suggested Approach

When the Labor Board is presented with factual circumstances even remotely resembling those involved in the *Emporium* situation, "[t]he individual's interest in the employment relationship should be protected by the law to the fullest extent compatible with the continued effectiveness of the collective bargaining process."²⁷² If an employee or group of employees merely attempt to discuss the adjustment of "grievances"²⁷³ with their employer, and no further action is undertaken, clearly the *proviso* to section 9(a) would afford them NLRA protection.²⁷⁴ However, where separate collective bargaining in dero-

270. See *Western Addition Community Organization v. NLRB*, 485 F.2d 917, 929-30 (D.C. Cir. 1973).

271. If the *Emporium* case is ultimately remanded to the Labor Board, it should naturally be permitted to consider whether the leaflets distributed by the dissident protesters, see text accompanying note 19 *supra*, either evidenced such disloyalty or were so offensive in tone as to warrant in themselves a denial of NLRA protection. See *NLRB v. Electrical Workers, Local 1229*, 346 U.S. 464 (1953); *Southwestern Bell Telephone Co.*, 200 N.L.R.B. No. 101, 82 L.R.R.M. 1247 (1972); *Stuart F. Cooper Co.*, 136 N.L.R.B. 142 (1962); *E.E. Majeroni, dba Home Restaurant Drive-In*, 127 N.L.R.B. 635 (1960); *Patterson-Sargent Co.*, 115 N.L.R.B. 1627 (1956); *E.A. Laboratories, Inc.*, 88 N.L.R.B. 673 (1950).

272. Blumrosen, *supra* note 127, at 1572.

273. See note 164 & accompanying text *supra*, regarding the narrow definition of "grievance."

274. See notes 161-66 & accompanying text *supra*. Although a union can legitimately waive certain otherwise protected employee rights during the term of a collective bargaining agreement it is quite apparent that it could not waive such a fundamental

gation of a union's exclusive status is sought, or concerted activity unauthorized by the representative labor organization is undertaken, the established "exclusivity" principle²⁷⁵ should, under normal circumstances, render the conduct unprotected.

It could be argued that the liberal *R.C. Can*²⁷⁶ test should be utilized to enable minority dissidents to engage in all peaceful concerted activity which does not violate any contractual restriction and which supports the *substantive* position of the union. However, if this broad standard were applied in cases involving alleged employment discrimination, it should be apparent that the action would, a fortiori, always be accorded protection, since both Title VII and the NLRA duty of fair representation clearly obligate a labor organization to oppose proscribed discrimination. The fact that most courts which have considered the question²⁷⁷ have adopted the much more narrowly drawn *Draper* test²⁷⁸ provides substantial support for the conclusion that such unauthorized minority actions should not generally be protected. A further consideration should prove to be conclusive.

The timing with respect to the utilization of economic weapons by a labor organization usually forms a critical part of its negotiating strategy.²⁷⁹ If a group of dissident employees were permitted to disrupt vital union plans by engaging in conduct constituting an untimely preemption of the representative's major weapon, they could completely destroy that agent's bargaining effectiveness, in total disregard of the rights of the majority employees. Therefore, "independent employee pressure contrary to the wishes of the union—even in support of the union's bargaining position—should be treated as a form of independent bargaining and, hence, unprotected,"²⁸⁰ *unless* conduct by the union is so opprobrious as to warrant a forfeiture of its exclusivity protection.²⁸¹

individual right as that expressed in the *proviso* to section 9(a). See, e.g., *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280 (1956) (right to strike); *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71 (1953) (right to refuse to cross a picketline); cf. *NLRB v. Magnavox Co.*, 94 S. Ct. 1099 (1974).

275. See text accompanying notes 152-201 *supra*.

276. See text accompanying note 187 *supra*.

277. See text accompanying notes 167-201 *supra*. Even the Fifth Circuit which originally decided the *R. C. Can* case has subsequently reconsidered the matter and has basically accepted the *Draper* approach. See notes 194-99 & accompanying text *supra*.

278. See notes 173-76 & accompanying text *supra*.

279. See *Black Power*, *supra* note 6, at 59.

280. Getman, *supra* note 169, at 1243.

281. Such opprobrious union "conduct" could, of course, entail inexcusable inaction as well as invidious action.

Where the federally protected right of minority workers to equal employment opportunity is being emasculated by unfair union representation, the affected minority employees, and their sincere supporters, should not be unconscionably straight-jacketed by application of the exclusivity doctrine. Under such circumstances, it would not only violate the fundamental principle embodied in section 704(a) of Title VII,²⁸² but it would also constitute an impermissible deprivation of the minority employees' constitutional rights,²⁸³ for a federal enactment to be enforced in a manner which denied them the opportunity to resort to peaceful self-help protest action. However, a negation of the "exclusivity" rules should not be permitted in conjunction with the mere allegation of a fair representation breach.²⁸⁴ A far more substantial prerequisite must be imposed, lest the exception be permitted effectively to engulf the rule.

Minority dissidents should *only* be allowed the protected right to engage in unauthorized concerted activity when their union representative has *in fact* violated the duty of fair representation owed to such individuals. Such a standard would afford minority union members the same type of protection currently accorded workers who cease working due to abnormally dangerous conditions of employment.²⁸⁵ However, as is recognized with respect to section 502 coverage, a good faith *subjective* belief that their labor organization has breached its obligation should not be sufficient to provide such workers with protection; rather, a reasonable *objective* standard should be utilized.²⁸⁶ Thus, where minority workers can *objectively* demonstrate that their statutory representative has violated its duty of fair representation, they should be permitted to engage in peaceful concerted activities aimed at the preservation of their own protected right to employment justice.²⁸⁷

282. See text accompanying note 248 *supra*.

283. See notes 264-65 & accompanying text *supra*.

284. Cf. Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151, 171 (1957).

285. L.M.R.A. § 502, 29 U.S.C. § 143 (1970), provides in relevant part that "the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees [shall not] be deemed a strike under this Act."

286. See *Gateway Coal Co. v. United Mine Workers of America*, 94 S. Ct. 623, 640-41 (1974); *Redwing Carriers Inc.*, 130 N.L.R.B. 1208, 1209 (1961).

287. As is true with respect to a section 502 work stoppage, such self-defense action by minority employees should not be regarded as violating a contractual no-strike provision. See 94 S. Ct. at 640-41; *Fruin-Colnon Constr. Co.*, 139 N.L.R.B. 894, 906 (1962); *Knight Morley Corp.*, 116 N.L.R.B. 140, 146 (1956), *enforced*, 251 F.2d 753 (6th Cir. 1957); cf. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956) (general no-strike clause does not prohibit a strike in response to substantial unfair labor prac-

The standard suggested here no doubt imposes a strict limitation on the right of minority dissenters to engage in unauthorized concerted activity, for it is recognized that a breach of a union's fair representation duty is frequently quite difficult to prove.²⁸⁸ Nonetheless, it is believed that such a requirement is not unreasonable, in light of the veritable plethora of non-disruptive avenues of relief available to individuals suffering from discriminatory employment practices.²⁸⁹ While this result certainly impinges upon the freedom of such employees, it cannot be forgotten that any protected freedom permitted to such workers not only negates the statutory rights of their labor union, the majority employees, and the employer, but also adversely affects the general public. Such dire consequences are defensible only where the majority workers, through their bargaining agent, have in fact deprived members of a minority faction of their fair representation right. While it would be unconscionable to afford these latter employees less protection than this, it should be clear that nothing in the NLRA, Title VII, or the Constitution requires the granting of greater safeguards.

Conclusion

In its *Emporium* decision, the D. C. Circuit endeavored to provide minority employees who wish to protest alleged employment discrimination expansive freedom to engage in possibly disruptive, concerted activity not authorized by their bargaining representative. While the court may have been motivated by the most altruistic principles, its holding is without support in the NLRA, Title VII, or constitutional considerations. It wholly ignores established Labor Act doctrines as well as recognized Title VII policies. Furthermore, the corresponding deprivation of the rights of labor organizations, majority workers, employers, and the general public sanctioned by the *Emporium* case is clearly unwarranted in light of the many non-disruptive, remedial alternatives available to minority dissidents. Thus, the result achieved by the D. C. Circuit should not be sustained. Rather, the courts should recognize that such minority employees may only engage in unauthorized concerted activity where their bargaining agent has *in fact* violated the duty of fair representation owed by it to such individuals. Such a rule would afford minority workers the

tices by an employer). But see *Arlan's Dep't Store*, 133 N.L.R.B. 802 (1961) (limiting scope of *Mastro Plastics* freedom to "serious, unfair labor practices").

288. See Meltzer, *supra* note 227, at 45; Boyce, *supra* note 69, at 242. See also *Sovern*, *supra* note 69, at 598-99.

289. See text accompanying notes 167-201 *supra*.

protected right to utilize reasonable measures of self-preservation where they can *objectively* demonstrate that their union representative is not fairly and adequately protecting their vital interests in equal employment opportunity. Where, however, such a breach of the union's obligation of fair representation cannot be established, resort to non-disruptive contractual, administrative, and/or judicial remedies should afford the minority dissidents sufficient protection.